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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

JACK C. CHILINGIRIAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT'S FINDING OF GUILTY ON THE MONEY LAUNDERING CONSPIRACY CHARGE WAS INCONSISTENT WITH ITS GENERAL FINDING OF NOT GUILTY ON ALL OTHER CONSPIRACY CHARGES ALLEGED IN THE INDICTMENT AGAINST THE PETITIONER.

II. WHETHER THE TRIAL COURT'S FINDING OF GUILT RELATING TO THE ALLEGED CONSPIRACY TO LAUNDER MONEY INSTRUMENTS IN COUNT 33 BASED ON THE PREDICATE ACTS OF MAIL AND WIRE FRAUD WAS AN UNCONSTITUTIONAL AMENDMENT OF THE INDICTMENT WHERE THE TRIAL COURT HAD FOUND PETITIONER NOT GUILTY OF THE UNDERLYING CONSPIRACY TO DEFRAUD CHARGES WHICH WERE ALSO BASED ON THE PREDICATE ACTS OF MAIL AND WIRE FRAUD.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jack C. Chilingirian, respectively prays that a writ of certiorari issue to review the opinions of the United States Court of Appeals for the Sixth Circuit rendered on February 12, 2002; April 9, 2004 and January 23, 2007, respectively.

OPINIONS BELOW

The Opinions of the Sixth Circuit Court of Appeals are found at *United States v. Chilingirian*, Docket No. 05-2273 (Order of January 23, 2007) (Unpublished), *United States v. Chilingirian,* 280 F.3d 704 (6th Cir. 2002) and *United States v. Chilingirian,* 95 Fed. Appx. 782 (6th Cir. 2004) (Unpublished). The Opinions are reproduced at App. 1a-4a, 5a-22a and 23a-43a, respectively.

STATEMENT OF JURISDICTION

The Judgment of the District Court was entered on October 18, 1999. Petitioner timely filed his Notice of Appeal on October 27, 1999. The Government timely filed its Cross-Appeal on November 24, 1999. The Sixth Circuit Court of Appeals issued its Opinion on February 13, 2002 reversing and remanding for resentencing.

The Amended Judgment of Conviction was entered on May 23, 2002. Petitioner timely filed his Notice of Appeal on May 30, 2002. The Sixth Circuit Court of Appeals issued its Second Opinion on April 9, 2004.

On November 10, 2004 Petitioner filed a Petition for Writ of Certiorari with this Honorable Court. On January 24, 2005 this Court in *Chilingirian v. United States,* 543 U.S. ___, 125 S.Ct. 1071 (2005) granted the Petition and

remanded the matter to the Sixth Circuit for consideration in light of *United States v. Booker*, 543 U.S. 220 (2005).

On March 9, 2005, the Sixth Circuit remanded the matter to the District Court for further proceedings in light of *United States v. Booker.* The Amended Judgment of Conviction was entered on August 25, 2005. Petitioner timely filed his Notice of Appeal on August 25, 2005. The Sixth Circuit Court of Appeals issued its Third Opinion in an unpublished order dated January 23, 2007.

On March 2, 2007, the Hon. John Paul Stevens, Associate Justice and Circuit Justice for the Sixth Circuit granted Petitioner's Application for Extension of Time to file this Petition for Writ of Certiorari through and including June 22, 2007.

This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a Grand Jury . . . Nor shall any person . . . be deprived of life, liberty or property without due process of law."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions the accused shall . . . be informed of the nature and cause of the accusation. . . ."

The Money Laundering Statute and the relevant sections read as follows:

> "Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such financial transaction which in fact involves the proceeds of specified unlawful activity – (a)(1) with the intent to promote the carrying on of specified unlawful activity; or (B) knowing that the transaction is designed in whole or part – (i) to conceal or disguise the nature, the locations, the source, the ownership, or control of the proceeds of specified unlawful activity . . . shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both . . . "

18 U.S.C. §1956(a)(1)(A)(i) & 18 U.S.C. §1956(a)(1)(B)(i)

19 U.S.C. §1956(h) reads:

> "Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy."

STATEMENT OF THE CASE

(1) Background. Petitioner, JACK C. CHILINGIRIAN, now 64 years old, is presently on supervised release and resides in Brewster, Massachusetts. He was a devoted husband and father who served his country in the Vietnam War, practiced law in the State of Michigan for almost 30 years and garnered a reputation as a hard-working ethical and honest attorney.

(2) The Indictment Against Chilingirian. On November 10, 1998, a Grand Jury sitting in the Eastern District of Michigan entered a Third Superseding Indictment

(App. 45a-68a) against Chilingirian and two other co-defendants who were former clients of his. In the Third Superseding Indictment, the Government charged Chilingirian with 33 Counts of criminal conduct, along with a forfeiture allegation, including conspiracy to defraud, aiding and abetting, mail and wire fraud, tampering with a witness, interstate transportation of funds taken by fraud and conspiracy to launder money instruments.

In Count 33, the only Count for which Chilingirian was convicted, the government charged conspiracy to launder money instruments in violation of 18 U.S.C. §1956(h). The Government styled Count 33 as "Conspiracy to Launder Money Instruments" and cited 18 U.S.C. §§1956(a)(1)(A)(i), 1956(a)(1)(B)(i) and 1956(h). (App. 62a-63a). The Government set forth Count 33 in three paragraphs. In the first paragraph, the government parroted the statutory language of 18 U.S.C. §§1956(a)(1)(A)(i) and 1956(a)(1)(B)(i), but did not describe any specific conduct relating to Chilingirian or any other defendant. (Id.) The Government prefaced the following two paragraphs of Count 33 with the qualifying allegation: "It was part of the money laundering conspiracy that . . . " (Id., App. 62a-63a). In each of the final two paragraphs, the Government went on to describe in a single sentence generalized conduct allegedly committed by the defendants. (Id.) The Government concluded Count 33 with the statement: "All in violation of Title 18, United States Code Section 1956(h)." (Id., App. 63a).

Nowhere in Count 33 did the government allege that there was an ***agreement*** between Chilingirian and the co-defendant, JACK RASHID charged in that Count.[1] The

[1] This was in contrast to Count 1 of the Indictment which alleged an agreement between all three named co-defendants to conspire to

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conspiracy was alleged as being between the Petitioner and "with other persons whose names are known and unknown to the Grand Jury." (App. 58a-59a). No evidence of any such ***agreement*** was presented at trial to establish this factual allegation.

(3) The Original Trial and Sentencing. Commencing on March 25, 1999, Chilingirian stood trial for the various counts alleged in the Third Superseding Indictment. Chilingirain with the government's consent, agreed to a bench trial, with the District Court Judge acting as the trier of fact. The government simultaneously tried Charles Rashid, another co-defendant, to a jury. The Government rested its case on April 15, 1999.

On April 29, 1999, the District Judge entered a **general finding** (App. 69a-70a) finding Chilingirian NOT GUILTY on all counts except Count 33. Other than the entry of the general finding, the District Court failed to make any additional formal factual findings at trial, either written or cral regarding Chilingirian's guilt as to Count 33.

Petitioner submitted a Motion for Judgment of Acquittal based on the contention that the court's general findings were inconsistent based on the divergent findings of not guilty on the conspiracy to defraud charges and the guilty findings on the conspiracy to launder money instruments charges. Prior to sentencing the district court dismissed the forfeiture allegations brought against the Petitioner.

On October 19, 1999, the District Court conducted Chilingirain's original sentencing hearing. At that sentencing hearing, the government maintained that the amount of

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commit offenses against the United States in violation of 18 U.S.C. §371. (App. 46a-56a) Petitioner was found not guilty of Count 1.

funds laundered was greater than $1,500,000 but less than $2,500,000; specifically the government concurred with the figure of $2,267,000. The District Court adopted the facts as set forth in the pre-sentence investigation report. Nowhere in the Third Superseding Indictment was there any **factual** statement or allegation asserting the amount of money that was allegedly laundered by the Petitioner.

Based on those facts, the District Court by the preponderance of the evidence sentenced Chilingirian under the Fraud Guidelines to 37 months imprisonment. The district Court did not impose a fine, but did impose an Order of Restitution.[2]

(4) Petitioner's First Direct Appeal. Chilingirian appealed his conviction asserting among other things, that his acquittal on all of the fraud counts was inconsistent with the district court's guilty finding on the conspiracy to launder count; that the indictment was unlawfully amended; and that the indictment was multiplicitous. *United States v. Chilingirian,* 280 F.3d 704, 708 (6th Cir. 2002). (App. 9a).

The Government cross-appealed, alleging that the district court erred in applying the money laundering guidelines. (App. 9a). The Sixth Circuit affirmed Chilingirian's conviction, but reversed the district court's sentencing order and remanded the case with instructions to resentence the Petitioner pursuant to the money laundering guidelines. (App. 22a).

Since Petitioner's direct appeal was not final and to avoid piecemeal review by this Court, the Petitioner did

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[2] Nowhere in the indictment did the government assert or seek restitution in any specified amount.

not file a Petition for Writ of Certiorari after the February 13, 2002 decision by the Sixth Circuit.

(5) Re-sentencing Hearing of May 23, 2002. On May 23, 2002, the district court held a re-sentencing hearing. Petitioner represented himself pro se.

One of the crucial arguments which the Petitioner raised before the district court was that pursuant to the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the district court was deprived of the jurisdiction to try, convict and sentence the Petitioner where all of the elements of the offense charged were not included in the indictment and found by the trier of fact at trial pursuant to the constitutional standard of beyond a reasonable doubt.

Petitioner argued that pursuant to a long line of cases emanating from this Court that the failure to recite any money amounts in Count 33 was fatal to the conviction and most certainly the sentence that had been imposed. Petitioner relied upon *In Re Winship,* 397 U.S. 358 (1970); *United States v. Gaudin*, 515 U.S. 506 (1995); and *Apprendi* to support this proposition. He asserted that under *Apprendi* and this Court's rationale recited in *United States v. R.L.C.,* 503 U.S. 291 (1991) the maximum sentence that could be imposed under the Federal Sentencing Guidelines was 0-6 months. Petitioner was arguing that any enhancements for which he was found to be guilty and sentenced under, had to be charged in the indictment and found at trial beyond a reasonable doubt.[3] It is undisputed that the Third Superseding Indictment failed to recite any

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[3] Petitioner's arguments presented to the district court in Motions at the time of his re-sentencing, foreshadowed this Court's rationale in *Ring v. Arizona*, 536 U.S. 584 (2002) and was most certainly supported by this Court's holding in *Blakely v. Washington*, 542 U.S. 296 (2004).

money amounts in Count 33 and in fact the amount of money laundered was determined **after** completion of the trial and was made pursuant to the preponderance standard.[4] The Petitioner again timely filed his second direct appeal on May 30, 2002 in the Sixth Circuit.

(6) Petitioner's Second Direct Appeal. Chilingirian in his second direct appeal asserted that the District Court erred by increasing the maximum punishment he faced based on facts not charged in the indictment and proven at trial beyond a reasonable doubt. Petitioner argued that the Due Process Clause required that the government charge in the indictment and prove beyond a reasonable doubt all facts that subject a criminal defendant to a sentence greater than the maximum otherwise authorized. Further, the district court had sentenced the Petitioner based on a number of enhancements not charged in the indictment nor proven at trial beyond a reasonable doubt.[5]

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[4] Petitioner's original sentence was increased from 37 months to 87 months in custody. At least 24 months of this increase was as a result of the district court's preponderance determination that the amount of money laundered which had **not** been charged in the indictment and stipulated to by the Government at the time of the first re-sentencing hearing at $2,267,000 supra, had now been increased by some $500,000. This additional amount of money raised Petitioner's Offense Level under the Guidelines, thereby increasing his sentence.

[5] The enhancements which the district court relied upon and which were not charged in the indictment were (1) based on the mistaken finding that Petitioner was convicted or otherwise could be responsible for the underlying crime of mail and wire fraud. (The district court had found Petitioner **not guilty** of all counts 2 thru 29 of mail and wire fraud); (2) the district court erroneously applied a two-level enhancement for misrepresentation or other fraudulent action during the course of a bankruptcy proceeding. (The district court should not have applied such an enhancement since it was not charged in the indictment and there was no factual showing of any intervening conduct that would

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(7) The Sixth Circuit's Second Reversal and Remand. On April 9, 2004, the Sixth Circuit again reversed and remanded for re-sentencing. Although, acknowledging the Petitioner's argument that "the operation of the offense defining statute in conjunction with Section 2S1.1 of the sentencing guidelines would result in a relevant maximum sentence of twelve months," (App. 27a), the Sixth Circuit rejected the Petitioner's rationale that a defendant money-launderer's enhancement under the guidelines based on the amount of funds laundered had to be submitted to the trier of fact and found beyond a reasonable doubt.

Rejecting the Petitioner's *Apprendi* and *Ring* arguments, the Sixth Circuit nevertheless again reversed the district court's re-sentencing order on the grounds that (1) the district court had failed to make independent findings pursuant to Fed. R. Crim. P. 32 (c)(1); and (2) that the re-sentencing range under the 1995 Guidelines might lower the possible sentence which the Petitioner could have received. (App. 32a).

(8) Petitioner's Submission of a Petition for Writ of Certiorari. After the Sixth Circuit remand pursuant to its April 9, 2004 Opinion this Court decided *Blakely v. Washington*. Based upon this Court's rationale in *Blakely* the Petitioner acting Pro Se filed a Petition for Writ of Certiorari with this Court on November 10, 2004.

(9) Re-sentencing Hearing of October 26, 2004. On October 26, 2004 the district court re-sentenced Petitioner to the same 87 month sentence and the same

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have warranted such an enhancement); and (3) again erroneously relied upon a higher value of funds allegedly laundered despite the fact that there was no new evidence presented at the re-sentencing hearing that had not been available at the original sentencing hearing.

restitution order it had imposed following the Sixth Circuit's first remand. The district court rejected any application of this Court's decision in *Blakely* and refused to consider the impact of the then-pending case of *United States v. Booker,* supra. Chilingirian again timely appealed to the Sixth Circuit. While Petitioner's appeal was pending, on January 24, 2005 this Court granted Chilingirian's Petition for Writ of Certiorari, vacated the Sixth Circuit's April 9, 2004 decision, and remanded the case back to the Sixth Circuit for reconsideration in light of *Booker.* On March 9, 2005, the Sixth Circuit vacated the October 26, 2004 re-sentencing Order and remanded the case back to the district court for further proceedings in light of this Court's January 24, 2005 Order.

(10) August 25, 2005 Re-Sentencing Hearing. On August 25, 2005, the district court re-sentenced Petitioner applying the recent *Booker* decision. The Petitioner raised challenges to the restitution order, the reasonableness of his sentence[6] and that his conviction was unconstitutional based on *Apprendi, Ring* and *Blakely.* Despite having the discretion to consider the factors which the district court had originally relied upon to impose a 37 month sentence or a lesser one than 87 months, it instead dismissed every argument offered by the Petitioner for a lesser sentence. It rejected out of hand the contentions regarding his conviction and did not even consider Petitioner's argument that his restitution penalty was unconstitutional. The District court, again re-imposed an 87 month sentence and ordered

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[6] At the time of the August 25, 2005 Re-sentencing Hearing the Petitioner had served 62½ months of his 87 month sentence. Only 7½ months remained to be served if the district court imposed the same sentence, which it did without considering the arguments made in support of a lesser sentence.

a $335,167.50 restitution penalty. Petitioner timely filed his third direct appeal with the Sixth Circuit.

(11) Petitioner's Third Direct Appeal. Chilingirian in his third direct appeal re-asserted his contention that his conviction was invalid based on the fact that a crucial element under the money laundering statute, i.e., money amounts were not charged in the indictment nor proven at trial beyond a reasonable doubt. Further, that the restitution order was in violation of the Fifth and Sixth Amendments in light of *Apprendi* and *Booker*. Petitioner also argued that his sentence was unreasonable.[7]

(12) The Sixth Circuit Order of January 23, 2007. On January 23, 2007, the Sixth Circuit entered an Order rejecting Petitioner's contentions raised on appeal. The Court concluded that the argument relating to the failure of the indictment was premised on an alleged defect which had not been raised pre-trial and was therefore not properly before the Court. (App 1a-4a). In addition, that the money amount recited in the Forfeiture allegation was sufficient notice to comport with the Fifth and Sixth Amendment challenges raised by the Petitioner. The Sixth Circuit also determined that the restitution challenge had been forfeited since it had not been raised in Petitioner's first direct appeal. Finally, the Court rejected the argument that the sentence imposed upon the Petitioner was unreasonable. (App. 3a-4a).

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[7] This issue is now moot based upon the completion of Petitioner's custodial sentence.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit opinion of February 13, 2002 (App. 5a-22a) creates a conflict between the circuit courts of appeal with respect to significant constitutional questions involving the Fifth and Sixth Amendments.

This case presents the ideal vehicle to resolve the question as to whether inconsistent verdicts should not be tolerated in a bench trial and whether such inconsistent verdicts should form the basis of reversing a conviction.

The Sixth Circuit opinion of February 13, 2002, acknowledged that the decisions in *United States v. Maybury*, 274 F.2d 899 (2d Cir. 1960) and *United States v. Duz-Mor Diagnostics Lab., Inc.*, 680 F.2d 223 (9th Cir. 1981) support Petitioner's argument that inconsistent verdicts in a bench trial are grounds for acquittal and reversal of a conviction, but held that "neither case [was] persuasive." (App. 13a).

The Sixth Circuit, on the other hand, in rejecting the argument presented by the Petitioner relied upon *United States v. West*, 549 F.2d 545 (8th Cir. 1977) and *United States v. Wright*, 63 F.3d 1067 (11th Cir. 1995) which held "that inconsistent verdicts rendered by a judge provide no greater grounds for reversal than inconsistent verdicts rendered by a jury." (App. 14a-15a).

This Court should grant certiorari to resolve the question of the above noted conflict between the circuit courts of appeal on this important constitutional question.

Further, the finding of guilt in the instant case resulted from an unconstitutional Amendment of the indictment in clear contravention of this Court's precedent in *Stirone v. United States*, 361 U.S. 212 (1960) and *Russell v. United States*, 369 U.S. 749 (1962).

As evidenced by the allegations in Count 33 of the Indictment (App. 62a-63a), the underlying specified unlawful activity which Petitioner was charged with in conspiring to launder money instruments was mail and wire fraud. The district court's finding of **not guilty** on the predicate acts of mail and wire fraud and the finding of guilt on the conspiracy to launder money instruments count was a broadening of the indictment in violation of the Fifth Amendment of the Constitution.

Moreover, the Sixth Circuit opinion asserting that acquittal on the predicate acts underlying the money laundering charge did not constitute an amendment of the indictment, creates a conflict with the Second and Tenth Circuit cases of *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002), *rev. on other grounds, United States v. Rybicki*, 345 F.3d 289 (2d Cir. 2006) (en banc) and *United States v. Rahseparian*, 231 F.3d 1257 (10th Cir. 2000).

This Court should grant the Petition for Writ of Certiorari to resolve this conflict between the circuit courts of appeal as well.

A. Inconsistent Verdicts Are a Ground for Reversal in a Bench Trial.

1. The Trial Court's General Finding of Guilty on the Money Laundering Conspiracy Charge in Count 33 Was Inconsistent With its General Finding of Not Guilty on All Other Conspiracy to Defraud Charges Asserted Against the Petitioner.

For over 75 years, federal law has been clear that inconsistent verdicts are not a basis of reversal of a conviction when they are returned by a jury. *Dunn v. United States*, 284 U.S. 390 (1932). *United States v. Powell*, 469

U.S. 57 (1984). This rule "has been explained by both courts and commentators as a recognition of the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercise of power by the Executive Branch." *Powell,* 469 U.S. at 65-66. See also, *United States v. Maybury*, 274 F.2d 899 (2d Cir. 1960).

Precisely because the rule permitting inconsistent jury verdicts arises from the unique nature and function of the criminal jury, it is ***not*** to be applied in bench trials where, of course considerations concerning the jury's role are entirely absent. In *Maybury*, the Second Circuit, in an opinion by Judge Henry Friendly, squarely rejected the government's position that inconsistent verdicts in a bench trial should be permitted to stand. After thoroughly exploring the justification for allowing inconsistent jury verdicts, Judge Friendly summarized the Court's holding that there is no basis for permitting inconsistent verdicts in bench trials based on the following rationale:

> "None of these considerations [for tolerating inconsistent verdicts in jury trials] is fairly applicable to the trial of a criminal case before a judge. There is no arbitral element in such a trial. While the historic position of the jury affords ample ground for tolerating the jury's assumption of the power to insure lenity, the judge is hardly the 'voice of the country', even when he sits in the jury's place. If he deems an indictment multiplicitous, he has only to say so, and the time for him to exercise any 'lenity' that he deems warranted is on sentence. There is no need to permit inconsistency in the disposition of various counts so that the judge may reach unanimity with himself, on the contrary, he should be forbidden this easy method of resolving doubts. In civil cases, inconsistencies in the findings of a judge are not

> tolerated, and inconsistencies even in jury verdicts may call for corrective action. *We do not believe we would enhance respect for the law or for the courts by recognizing for the judge the same right to indulge in 'vagaries' in the disposition of criminal charges that, for historic reasons has been granted the jury.* We know the role of logic in law is not unlimited; but 'Holmes did not tell us that logic is to be ignored when experience is silent.' Since we find no experience to justify approval of an inconsistent judgment when a criminal case is tried to a judge, we think logic should prevail" 274 F2d. at 903. (Emphasis added).

A number of other courts (both federal and state), as well as the leading commentator on federal trial procedures, have adopted the Second Circuit's conclusion that inconsistent verdicts should not be tolerated in a bench trial.[8] For instance, the Ninth Circuit adopted the reasoning of *Maybury* in *Duz-Mor Diagnostics Lab Inc.*, 650 F.2d 223 (9th Cir. 1981) and said:

> "The reasons for deferring to human frailty in dealing with juries do not apply to bench trials. First, the nature of the judge's decision involves no collective deliberation and therefore no element of compromise in assessment of the evidence. Second, there is no need to defer to the

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[8] There is a split of authority concerning the permissibility of inconsistent verdicts rendered by the trial court sitting as the trier of fact. The cases which are to the contrary including the decision by the Sixth Circuit in the instant case are: *United States v. Wright*, 63 F.3d 1067, 1074 (11th Cir. 1995); *United States v. West*, 549 F.2d 545, 553 (8th Cir. 1977), *cert. denied*, 430 U.S. 956 (1977); *People v. O'Malley*, 108 Ill. App. 3d 823, 833, 439 N.E.2d 998 (1982) (inconsistent court verdict permissible if supported by rational explanation on record); *Commonwealth v. Harris*, 239 Pa.Super. 603, 606, 360 A.2d 728 (1976) (inconsistent court verdict permissible), aff'd, 488 Pa. 141, 411 A.2d 494 (1979).

> privacy of jury deliberations or to the possibility that an acquittal is merely an exercise of the jury's power of deciding 'in the teeth of both law and facts'. *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920) (Holmes, J.)." 650 F.2d at 226.

Likewise, appellate courts in Maryland, Kansas, Virginia and New York have refused to permit trial judges to return inconsistent verdicts. *Shell v. State*, 307 Md. 46, 54, 512 A.2d 358 (1986); *State v. Meyer*, 17 Kan. App. 2d 59, 70, 832 P.2d 357 (1992); *Akers v. Commonwealth*, 31 Va. App. 521, 530-31, 525 S.E.2d 13 (2000); *People v. Vaughn*, 409 Mich. 463, 466, 295 N.W.2d 354 (1980); *People v. Williams*, 99 Mich. App. 463, 465, 297 N.W.2d 702 (1980).[9]

In *State v. Meyer*, the Kansas Court of Appeals offered the following persuasive rationale for refusing to tolerate inconsistent verdicts in a bench trial:

> "The rationale for permitting inconsistent jury verdicts is simply not applicable to a bench trial under these circumstances.[10] There can be no argument that the inconsistency is the result of compromise or any effort to achieve unanimity with a bench trial. *A trial court is bound by fundamental principles of logic and has a duty to explain its decisions.* Our system simply has more

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[9] Most recently the Connecticut Supreme Court in *State v. Knight*, 266 Conn. 658, 672, 835 A.2d 56 (2003) acknowledged that the issue was an open question in that jurisdiction and avoided the question. However, it did indicate that it found the logic expressed in *Maybury* to be persuasive.

[10] See also, Muller, *The Hobgoblin of Little Minds? Our Foolish Laws of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 802 n. 159 (1998) ("There may be valid reasons for not requiring juries to have and articulate a rational basis for verdicts they reach in a criminal case, but none of them apply to judges hearing bench trials.").

> tolerance of inconsistencies where a jury is concerned.[11] A trial court is duty bound to apply the law in a non-arbitrary or capricious manner. *A rule which would permit judgments which cannot be defended upon a logical basis would not enhance respect for the law, the courts, or the process.* For an appellate court to uphold such a judgment, which on its face is illogical or arbitrary, would likely undermine respect for the courts. *Meyer*, 17 Kan. App. at 68, 832 P.2d at 364.

Recently, the Connecticut Supreme Court in *State v. Knight*, in evaluating the rule of inconsistent verdicts in bench trials noted that:

> "It is clear that, in *Maybury*, the Second Circuit was concerned solely with the situation wherein a trial court, sitting as the sole trier of fact, has undermined the credibility of its own decision by rendering two or more verdicts that are inconsistent with each other. Indeed, the court explained that the reason for reversing an inconsistent verdict by a trial court 'is not because of any desire for elgantia juris but because we can have no confidence in a judgment convicting [the defendant] of one crime when the judge, by his acquittal of another appears to have rejected the only evidence that . . . would support the conviction here.' . . . " 266 Conn. At 672.

In the instant case, it is crystal clear that the predicate acts of mail and wire fraud were findings of the grand

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[11] In several jurisdictions, however, some inconsistent verdicts of acquittal and conviction are not tolerated even when rendered by juries. See, e.g., *De Sacia v. State,* 469 P.2d 369 (Alaska 1970); *Redondo v. State,* 403 So. 2d 954 (Fla. 1981); *Kuck v. State,* 149 Ga. 191, 99 S.E. 622 (1919); *People v. Frias*, 99 Ill. 2d 193, 457 N.E.2d 1233 (1983).

jury as set forth in Count 33 of the indictment. Proof of those charges was required to convict the Petitioner. It is also clear that the district judge gave a direct acquittal of those specific charges found in other counts of the indictment. This resulted in an inconsistent verdict which should have resulted in the reversal of Petitioner's conviction.

2. The Sixth Circuit Opinion of February 13, 2002 Permitting Inconsistent Verdicts in Bench Trials Conflicts With Precedent From Other Circuit Courts of Appeal as Well as Several State Appellate Courts.

The Sixth Circuit in the instant case was faced with an issue of first impression in that Circuit with respect to the question of whether an inconsistent verdict in a bench trial was grounds for reversal or for a new trial. (App. 12a).

To the extent that the opinion in the instant case was couched in the language that this issue had not been resolved in the Sixth Circuit, (id.), it was not entirely accurate as pointed out by Petitioner. In his initial Brief to the Sixth Circuit he relied upon *United States v. Dotson*, 871 F.2d 1318 (6th Cir. 1989) where the Court reviewed the inconsistent verdict rule. Although, *Dotson* involved a jury trial, the rationale expressed in that case would still be applicable to the facts of the instant case.

The defendant in *Dotson*, had been charged with using a communication device to facilitate distribution and possession of controlled substances in violation of 21 U.S.C. § 843(b). The Sixth Circuit in relying on authority from other circuit courts of appeal, indicated that based on the due process clause, the government was required to prove beyond a reasonable doubt the commission of the

predicate offense and every fact necessary to the crime charged in the indictment. The Court in *Dotson*, in examining the inconsistent verdict rule stated:

> "that where an indictment charges a specific conspiracy in one count and in a separate count charges a section 843(b) violation in furtherance of that same conspiracy, the permissible inconsistent verdict rule . . . cannot operate to sustain a conviction for a section 843(b) violation if the defendant is acquitted of the underlying conspiracy." 871 F.2d at 1322.

The factual pattern relating to the charges in *Dotson* are similar to the ones in the instant case. The section 371 conspiracy in Count 1 for which the Petitioner was acquitted had as its predicate the mail and wire fraud offenses which were also the predicate offenses cited in the conspiracy to launder money Count 33.

The Sixth Circuit in *Dotson* relied upon this Court's authority of *In Re Winship*, 397 U.S. 358 (1970) for holding why inconsistent verdicts should not be tolerated. This Court in *Winship* had declared:

> "that a society that values the good name and freedom of every individual should not convict a man for commission of a crime when there is reasonable doubt about his guilt." 397 U.S. at 363-64.

The district court's general findings that Petitioner was not guilty of the underlying conspiracy to defraud charges were inconsistent with the guilty findings of guilt on the conspiracy charges recited in Count 33 when both charges were premised on the same predicate offenses of mail and wire fraud.

The inconsistent verdict rule has been held applicable in reversing convictions by several circuit courts of appeal

as well as state appellate courts. (See Footnote 8, supra). Where a defendant is acquitted of an underlying crime, but found guilty of the same crime by the use of some instrumentality, a "unique situation" arises whereby the application of the inconsistent rule should preclude conviction especially in the setting of bench trials. Because there is a conflict in the circuit courts of appeal and the state courts as to this issue, this case is an excellent vehicle to resolve this conflict.

B. The District Court's Finding of Guilt as to Count 33 Which Was Based on the Predicate Acts of Mail and Wire Fraud Was an Unconstitutional Amendment of the Indictment Where the Court Had Found Petitioner Not Guilty of the Underlying Conspiracy to Defraud Charges Which Were Also Based on the Predicate Acts of Mail and Wire Fraud.

1. An Amendment of the Indictment Occurred in the Instant Case Warranting Reversal of Petitioner's Conviction.

This Court has long recognized the damaging effect of the modification of the charges issued by a Grand Jury. In *Ex Parte Bain*, 121 U.S. 1 (1887) this Court stated:[12]

> "If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what it ought to have been, or what the grand jury would probably have made it if their attention had been

[12] This portion of the holding from *Ex Parte Bain* was not overruled by *United States v. Cotton*, 535 U.S. 625 (2002) where this Court held that "insofar as it held that a defective indictment deprived a court of jurisdiction, *Bain* is overruled." 535 U.S. at 631.

> called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's crime, and without which the Constitution says 'no person shall be held to answer' may be frittered away until its value is almost destroyed." 121 U.S. at 10.

This underlying principle framed in the Fifth Amendment protection was further amplified in *Bain* as follows:

> "Any other doctrine would place the rights of its citizens, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or order of the court in the body of the indictment as presented by the grand jury, the indictment as thus charged, the restriction which the Constitution places upon the power of the court in regard to the prerequisite of an indictment, in reality no longer exists." 121 U.S. at 10, 13.

Almost a century later this Court in *Stirone v. United States,* 361 U.S. 212 (1960) relying upon the language from *Bain* recited above, indicated that an accused's rights are constitutionally violated when a modification occurs at trial that broadens the charges contained in an indictment. This Court in *Stirone* held that:

> "the very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of **either prosecuting attorney or judge.**" 361 U.S. at 218. (Emphasis added).

A short two years later this Court in *Russell v. United States*, 369 U.S. 749 (1962) reaffirmed this principle relying on *Bain* and *Stirone* and noted that:

> "A grand jury, in order to make that ultimate determination must necessarily determine what the question under inquiry was. To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guarantee of the intervention of a grand jury was designed to secure. For then a defendant could be convicted on the basis of facts not found by, and perhaps not even presented to the grand jury which indicted him." 369 U.S. at 770.

The right of a defendant to rely upon the indictment handed down against him is well settled under this Court's prior precedent. An individual charged in a criminal indictment has a right to be tried upon what the grand jury found. It is a vital and necessary ingredient to an accused's constitutional rights that the mechanics of law requirement that the charges specified in an indictment be followed and met. Failure to do so requires the reversal of a conviction.

In the instant case, the language contained in Count 33 did not allege an agreement between the Petitioner and the named Defendants in the indictment. The language recited in the indictment read as follows:

> ".... defendant Jack Rashid and defendant Jack Chilingirian, ... did knowingly. Intentionally and unlawfully combine, conspire, confederate and agree **with other persons** whose names are known and unknown to the Grand Jury, to conduct and cause to be conducted financial transactions, ... which involved the proceeds of specified

> unlawful activity, . . . that is **mail and wire fraud.**" (Emphasis added) (App. 62a-63a).[13]

The Petitioner contended that the trial judge acting as the trier of fact had constructively amended the indictment by virtue of his **not guilty** findings on the mail and wire fraud elements in the underlying conspiracy to defraud charges and the finding of guilt on Count 33 the Money Laundering charges which contained those same predicate acts.

First, the district court was faced with an indictment that **did not** allege an agreement between the two named co-defendants who were allegedly involved in the conspiracy to launder money instruments in Count 33. An alleged agreement between "named and unnamed persons" was never established at trial. Without any averment or evidence of this required "agreement with conspirators," a guilty verdict was entered. This alone was an unconstitutional amendment of the indictment.

Second, the trial court's finding that Petitioner was **not guilty** of the mail and wire fraud charges in the underlying conspiracy to defraud and then a finding of **guilt** as to Count 33 based on the same predicate acts was an unconstitutional amendment of the indictment as well. It gave the prosecutor a wider berth not allowed under the Fifth Amendment. It lessened the burden of establishing the elements charged in Count 33.

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[13] At trial the Government presented no testimony or evidence that established the names, dates, or factual basis for the alleged conspiracy agreement with those "known and unknown persons." There was no allegation of any conspiracy agreement between the named defendants. Such a conspiracy agreement between the Petitioner and "others" was required to be proven beyond a reasonable doubt. *United States v. Avery*, 128 F.3d 966, 971 (6th Cir. 1997). This the government failed to do.

There are three classifications of modifications to indictments which have been recognized by the courts: a variance, an amendment and a third category lying between the two – a constructive amendment. The concepts of variances and constructive amendments are closely related.

It is commonly understood that an amendment of an indictment occurs when the charging terms are **altered** either literally or in effect, by the prosecutor or the judge after the grand jury has last passed upon them. *United States v. Barrow*, 118 F.3d 482, 488 (6th Cir. 1997).

A variance occurs when the charging terms of an indictment are left **unaltered**, but the evidence offered at trial proves facts **materially different** from those alleged in the indictment. *United States v. Combs,* 369 F.3d 925, 935-36 (6th Cir. 2004).

Blurring the difference between amendments and variances is the concept of constructive amendments which occur when an indictment's terms are **effectively altered** by the presentation of evidence and jury instructions that so modify essential elements of the offense charged that there is a substantial likelihood that the defendant was convicted of an offense other than that charged in the indictment. *United States v. Hynes*, 467 F.3d 951, 961-62 (6th Cir. 2006).

An amendment is considered per se prejudicial because it affects the Fifth Amendment guarantees of the accused and therefore constitute grounds for the reversal of the judgment of conviction. *United States v. Ford*, 872 F.2d 1231, 1235 (6th Cir. 1989).

The burden of proving that a variance has occurred and that the variance arises to the level of a constructive

amendment is on the defendant. *United States v. Hynes*, (id.), (citing *United States v. Chilingirian*, 280 F.3d at 712).

In the instant case, the Petitioner asserted that there was such a variance or constructive amendment. The Sixth Circuit's explanation for rejecting this contention that the indictment had been amended was expressed as follows:

> "The indictment listed mail and wire fraud as the unlawful activities that generated the proceeds that Chilingirian conspired to launder. But, according to the money laundering statute, a defendant can be guilty of money laundering as long as he knew that his transactions involved proceeds of some unlawful activity – he does not have to know what form the unlawful activity took. Therefore, while the money did have to come from the specified unlawful activity of wire and mail fraud, Chilingirian **did not have to know that this was an element of the charged offense.** Given that Chilingirian did not have to be aware of this element, it would be illogical to conclude that Chilingirian himself actually committed that unlawful activity." 280 F.3d at 712. (Emphasis added). (App. 17a).

This is contradictory to the language in the indictment which alleged that the money laundering occurred through the unlawful activities of mail and wire fraud. Proof of those facts was necessary to convict the Petitioner and is contrary to other precedent from several circuit courts of appeal. Infra.

The above explanation by the Sixth Circuit in rejecting Petitioner's argument that there had been a constructive amendment is not supported by case precedent and as recited herein is contradicted by authority from other circuit courts of appeal. Further, it fundamentally overlooks the issue of what the Grand Jury considered when it

executed the true bill against the Petitioner. With respect to the idea that Petitioner did not have to have knowledge of the elements of conspiracy to launder money instruments, such a premise goes contrary to the "bedrock" principles which have long been recognized and accepted as an indispensable element of proof in virtually every criminal prosecution. *United States v. Bailey*, 444 U.S. 394, 404-06 (1980).

The element of knowledge is contained in the Money Laundering statute. It has long been recognized as a requirement of proof under the American system of jurisprudence. *United States v. United States Gypsum Co.*, 436 U.S. 442, 440 (1978).

It was not until the Sixth Circuit rendered its opinion in *United States v. Chilingirian,* that this element of knowledge was dispensed with despite language in the statute to the contrary. This Court has suggested that where there is a harsh penalty attached to a violation of a particular criminal statute, (i.e., 20 years imprisonment for violating 18 U.S.C. §1956) significant consideration should be given as to whether the statute should be construed as dispensing with the knowledge element. This Court in *Staples v. United States,* 511 U.S. 600 (1994) indicated:

> "that where, as here, dispensing with *mens rea* would require the defendant to have knowledge only of traditionally unlawful conduct, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement. In such case, the usual presumption that a defendant must know the facts that make his conviction illegal should apply." 511 U.S. at ____, 128 L.Ed.2d at 624.

In addition to eliminating the "knowledge" element for money laundering conspiracies, the Sixth Circuit decision in the instant case created a conflict in the Circuit Courts of Appeal with respect to the issue of whether acquittal of the predicate acts of specified unlawful activity recited in an indictment are grounds for the acquittal of a conviction for a money laundering charge that contains those predicate acts.

By virtue of its decision in *United States v. Chilingirian,* the Sixth Circuit has created the conflict in the Circuit Courts of Appeal on the issue presented which the Petitioner requests that this Court resolve.

2. The Sixth Circuit Decision of February 13, 2002 Is in Conflict With Other Circuit Courts of Appeal Which Have Held That Acquittal of Predicate Acts That Are Specified in an Indictment Charging Money Laundering Are Fatal to a Conviction and Forms the Basis for Reversal of Such a Conviction.

The Petitioner relies upon *United States v. Rahseparian*, 231 F.3d 1257 (10th Cir. (2000)[14] and *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002), *rev. on other grounds, United States v. Rybicki,* 354 F.3d 124 (2d Cir. 2003) (en banc), *cert. denied,* 543 U.S. 809 (2004) for the above contention.

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[14] Subsequent to oral argument in 2001, counsel representing the Petitioner in the Sixth Court submitted a supplemental memorandum addressing the applicability of *Rahsaparian* to the facts of the instant case. The Sixth Circuit never examined the *Rahsaparian* decision nor did it address the issue presented.

In *Rahseparian,* the Tenth Circuit in reversing the money laundering conviction indicated that where a defendant (as in the similar circumstance as Chilingirian in the instant case) was not a part of the underlying illegal activity "the knowledge components of the money laundering statute collapse[s] into a single inquiry – did [the defendant] **know that [the] funds were derived from an illegal source?"** *Rahseparian,* 231 F.3d at 1264-65 citing to *United States v Campbell,* 977 F.2d 854, 858 (4th Cir. 1992) (Emphasis added).

The Court in *Rahseparian,* went on to state that where a defendant is a non-participant in the fraud or conspiracy allegations, the mere fact of handling the moneys involved[15] cannot evidence any "intent to conceal" money from an illegal source if the defendant had no knowledge the money was illegally obtained in the first place. The Court in *Rahseparian,* concluded that:

> "Moreover, because the indictment in this case specifically charged that the unlawful activity underlying the money laundering count was mail fraud." The government was obligated to prove not only that [defendant] knew the money was obtained illegally, **but that it was obtained by mail fraud.** 231 F.3d at 1265. (Emphasis added).

The rationale expressed in *Rahseparian,* would be applicable to the indictment and the allegations recited in Count 33 where the specified unlawful activity was mail and wire fraud. The Court in *Rahseparian,* in relying upon *Stirone* pointed out that "it is a fundamental precept of

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[15] Prior to the original sentencing October of 1999 the district court Judge alluded to the fact that case boiled down to what the government had characterized as "receipt and deposit" of funds which the court construed to be at best "ministerial" money laundering.

federal constitutional law that a 'court cannot permit a defendant to be tried on charges that are not made in the indictment'" citing *Hunter v. New Mexico,* 916 F.2d 595, 598 (10th Cir. 1990) (per curiam) and *Stirone.* This is the exact circumstance which Petitioner faced in the instant case which was decided the other way by the Sixth Circuit.[16]

In *Handakas,* the Second Circuit was addressing a situation where the defendant has been convicted of conspiracy to commit mail fraud and conspiracy to launder the proceeds of mail fraud and structuring of financial transaction to evade currency reporting laws. The defendant contended that the money laundering conviction which was based on the laundering of funds derived from the unlawful activity of mail fraud had to fall because of the unconstitutional conviction of the mail fraud count.

The Court in *Handakas,* indicated that the only predicate for the finding that the proceeds were from and illegal activity was mail fraud. Since Handakas's conviction for mail fraud had been reversed by the Second Circuit, the money laundering conviction had to "fall with it." 286 F.3d at 113.

In the instant case, the government was required to prove the predicate acts of mail and wire fraud which were alleged in Count 33. The Third Superseding Indictment

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[16] The Court in *Rahseparian,* also noted that the Government argued (as they did in the instant case) that the defendant actually committed and conspired to commit mail fraud. The conclusion by the Tenth Circuit was that, since the evidence was insufficient to maintain a conviction for mail fraud, the money laundering conviction count could not stand. The premise for this determination was that there was no proof on the money laundering count which was imposed by the terms of the indictment which required proof of the predicate acts. 231 F.3d at 1267.

charged that the funds that were allegedly deposited and transferred were the proceeds of alleged illegal activity, i.e., mail and wire fraud. (App. 63a). Since the district court found Petitioner not guilty of those predicate acts, the money laundering conviction could not be sustained.

Based upon the above authority, the district court allowed the government to establish its case for money laundering **without** proving the predicate acts of mail and wire fraud which were alleged the indictment. This was an unconstitutional amendment of the indictment and is contrary to the holdings in *Rahseparian* and *Handakas*. Thus, conduct which was found not illegal in the Second and Tenth Circuits has been found to be illegal in the Sixth Circuit resulting in a conflict between the Circuit Courts of Appeal.

This Court should take this case as an appropriate vehicle to resolve the Circuit conflict on this important constitutional issue.

CONCLUSION

For the above recited reasons the Petition for Writ of Certiorari should be granted.

Dated: June 18, 2007

Respectfully submitted,

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No. 05-2273
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JACK CHILINGIRIAN, Defendant-Appellant.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

ORDER

(Filed Jan. 23, 2007)

Before: SUHRHEINRICH, GIBBONS, and COOK, Circuit Judges.

Jack Chilingirian, a federal prisoner, appeals pro se the sentence imposed on remand for his conviction of conspiracy to launder monetary instruments. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P 34(a).

In 1999, following a nearly month-long bench trial, Chilingirian was convicted of conspiracy to launder monetary instruments. The district court sentenced him under the fraud guidelines to thirty-seven months of imprisonment and restitution of $335,167.50. Chilingirian appealed his conviction, and the United States cross-appealed the sentence. We affirmed the conviction, but remanded for resentencing under the money laundering guidelines. *United States v. Chilingirian*, 280 F.3d 704,

707-08 (6th Cir. 2002). On remand, Chilingirian was sentenced under the money laundering guidelines to eighty-seven months of imprisonment. We remanded again for a statement of reasons in computing the offense level. *United States v. Chilingirian*, 95 F. App'x 782 (6th Cir. 2004). The same sentence was imposed again on remand. Finally, the matter was remanded a third time for consideration under *United States v. Booker*, 543 U.S. 220 (2005). The 87-month sentence was again imposed, and this appeal followed.

Chilingirian raises three arguments in his brief: 1) the indictment was insufficient because the amount of money laundered was not included, 2) the court erred in imposing restitution, and 3) the 87-month sentence is unreasonable.

First, Chilingirian raises a challenge to his conviction based on an alleged defect in the indictment. However, his conviction was affirmed on direct appeal in 2002. This claim was not raised at that time nor had it been raised pretrial. Even if this issue were properly before us, it lacks merit. An indictment is sufficient where it tracks the language of the statute, giving the defendant notice of the charge against which he must defend and protecting him from double jeopardy. *United States v. Martinez*, 981 F.2d 867, 872 (6th Cir. 1992). Absent any prejudice to either of these interests, a conviction may not be challenged based on an omission in an indictment. *United States v. Velasco-Medina*, 305 F.3d 839, 847 (9th Cir. 2002). Chilingirian does not argue that he lacked notice of the charge or that he has been exposed to double jeopardy. Moreover, the indictment did include the amount of money laundered in this conspiracy. In the forfeiture portion of the indictment, it was stated that not less than $2,589,699.25 was

involved in the money laundering conspiracy in count 33, the count of which Chilingirian was convicted.

Next, Chilingirian argues that restitution was improperly ordered. Again, he forfeited this claim by not raising it in his direct appeal, and it is not cognizable in this proceeding. *United States v. McKinley,* 227 F.3d 716, 718-19 (6th Cir. 2000). Chilingirian also acknowledges that this court has rejected his argument that restitution is affected by the holding in *Booker. United States v. Sosebee,* 419 F.3d 451, 461 (6th Cir. 2005). Finally, the issue is meritless because Chilingirian admitted that restitution in the amount ordered, $335,167.50, was proper because that was the amount of the checks that he wrote to himself from the trust accounts funded by his co-defendants' fraudulent scheme.

Finally, Chilingirian addresses an issue which is properly raised in this appeal from his resentencing. He argues that his 87-month sentence is unreasonable. Following *Booker,* sentences are reviewed for reasonableness. *United States v. Jackson,* 408 F.3d 301, 304 (6th Cir. 2005). Sentences within the guideline range are presumptively reasonable. *United States v. Cage,* 458 F.3d 537, 540 (6th Cir. 2006). Here, the sentence was the lowest available within the guideline range. However, Chilingirian argues that the district court failed to adequately consider the other sentencing factors set forth in 18 U.S.C. § 3553(a). A district court need not recite the factors in § 3553(a). *United States v. Chandler,* 419 F.3d 484, 488 (6th Cir. 2005). However, the district court judge did so in this case. He went on to analyze the factors, specifically mentioning Chilingirian's characteristics and the impact on the victims, and alluding to the seriousness of the offense, and the need for just punishment and deterrence.

It is noted that this was the fourth sentencing hearing held in this case, and that the judge was intimately familiar with all the factors. This judge acquired familiarity through his role as fact-finder in the month-long bench trial, where the government proved that Chilingirian's money laundering aided his co-defendants in swindling approximately six million dollars from victims who believed they were investing in a legitimate business enterprise. The sentence of eighty-seven months of imprisonment, at the bottom of the guideline range, has not been shown to be unreasonable.

For all of the above reasons, the district court's judgment is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Clerk

280 F.3d 704

United States Court of Appeals,
Sixth Circuit.

UNITED STATES of America,
Plaintiff-Appellee/Cross-Appellant,
v.
Jack CHILINGIRIAN,
Defendant-Appellant/Cross-Appellee.
Nos. 99-2276, 99-2376.
Argued June 13, 2001.
Decided and Filed Feb. 13, 2002.

Jennifer J. Peregord (argued and briefed), Office of the U.S. Attorney, Detroit, MI, for Plaintiff-Appellee/Cross-Appellant in Nos. 99-2276, 99-2376.

Kenneth H. Karam (argued and briefed), Peralta, Johnston & Karam, St. Clair Shores, MI, Jack Chilingirian, McKean Federal Correctional Institution, Bradford, PA, for Defendant-Appellant/Cross Appellee in Nos. 99-2276, 99-2376.

Before: JONES, SUHRHEINRICH, and DAUGHTREY, Circuit Judges.

OPINION

NATHANIEL R. JONES, Circuit Judge.

Defendant Jack Chilingirian appeals his federal conviction and sentence on money laundering charges. On April 23, 1997, a grand jury of the Eastern District of Michigan returned a multiple count indictment against Chilingirian, an attorney, and three of his clients, Jack, Charles, and George Rashid. The Rashids were indicted on the basis of fraudulent business ventures concerning the

development, manufacture, and sale of automobile radar-braking systems to avoid collisions. At a bench trial, Chilingirian was convicted of conspiracy to commit money laundering. He was sentenced to 37 months imprisonment, two years supervised release, and restitution in the amount of $335,167.50. Chilingirian now appeals his conviction, citing inadequacies in the indictment and inconsistencies in the verdicts, and challenging the Bail Reform Act. The government cross-appeals, contending that the defendant was sentenced under the wrong guideline. We agree with the government's contention and therefore AFFIRM the defendant's conviction, but REMAND the case to permit re-sentencing under the appropriate provisions of the Sentencing Guidelines.

I. FACTS

On April 23, 1997, a grand jury in the Eastern District of Michigan returned a multiple count indictment against three brothers, Jack, Charles, and George Rashid, and their attorney, Jack Chilingirian. The indictment arose out of a scheme largely carried out by Jack and Charles Rashid to defraud investors in fraudulent business entities, based on actual or nearly-completed multi-million dollar contracts for the sale of automobile radar braking systems and related radar technology.[1]

Chilingirian served as the attorney for the Rashids and the Rashid family's company, Vehicle Radar Safety

[1] For a more detailed account of the facts regarding the Rashid investment schemes and the trials and appeals of Jack and Charles Rashid, *see United States v. Rashid,* 274 F.3d 407(6th Cir.2001). George pleaded guilty to a lesser charge and did not appeal.

Systems, Inc. ("VRSS") from 1988 or 1989 through the date of the indictment. He held a fifteen percent share in VRSS.

In 1992, Chilingirian represented VRSS when it filed a Chapter 11 bankruptcy reorganization petition, which was later converted into a Chapter 7 liquidation proceeding. During the pendency of the bankruptcy proceedings, a group of investors, referred to as the "Rudder Group," entered the picture. In August 1992, Charles Rudder met the Rashids when he was working for Gencorp Aerojet ("Aerojet"), which was discussing with VRSS the possibility of buying its radar braking technology, or perhaps the company. In December of 1992, Aerojet informed the Rashids that they would not go forward with any deals. Nevertheless, Rudder and other people who knew Chilingirian also invested in VRSS.

In early 1995, in light of the bankruptcy, the Rudders began taping telephone conversations with the Rashids and Chilingirian. In one of these conversations, Chilingirian said that he had been working on something that was going to be fabulous. Chilingirian also reassured others that he was working on several deals.

In mid-1995, Chilingirian attempted to settle all of the bankruptcy claims against VRSS and the Rashids with money available from a group of investors known as the "Tindall Group." Paul Tindall, and his wife Ann Louise, lived in Canada and were related to Jack Rashid's wife. The Tindalls met with Jack Rashid in January 1995. In late June 1995, the Rashids went to Toronto to present their technology to, and seek investments from, a group of over thirty people who learned of this opportunity through Paul Tindall.

In December 1995, Advanced Radar Systems ("ART") was incorporated in Canada in order to take in the money from the Canadian investors. Neither the Rashids nor Chilingirian informed the Canadian investors about VRSS's bankruptcy or their plan to use the investors' money to pay creditors. The Canadians invested heavily, but the money was put into VRSS. According to the government's summary, the records of Chilingirian's client trust fund show that $2.48 million in checks was given to Jack Rashid by ART-Canada investors. Chilingirian endorsed $2.267 million of those checks into his trust account. Chilingirian then wrote $275,000 worth of checks to himself, gave $1.473 million to Jack Rashid, and disbursed $480,000 to settle various investors' claims against Rashid. Aside from Peter Tindall, none of the Canadian investors have ever recouped any money invested with the Rashids.

When Chilingirian incorporated ART in Canada on behalf of Jack Rashid, he opened a new client trust account as well. According to the government, this account was used to launder money received from the last group of investors, the "Kraft Group." James Kraft was a long time friend of Jack Rashid. He was solicited for money in April 1996, and invested money from his retirement account. He also brought in contributions from over thirty other investors.

In 1996, Chilingirian and members of the Rudder Group discussed settlement of the investors' claims against the Rashids/VRSS. Some investors did get a portion of their money back, but they had to sign affidavits exculpating Jack Rashid. Similarly, despite numerous complaints from investors, Chilingirian continued to deposit money from the Kraft Group into his client trust

account, then withdraw some for Jack Rashid and a lesser amount for himself.

On April 23, 1997, Chilingirian was indicted on charges of conspiracy in violation of 18 U.S.C. § 371, mail fraud in violation of 18 U.S.C. § 1341, wire fraud in violation of 18 U.S.C. § 1343, aiding and abetting the interstate transportation of funds taken by fraud in violation of 18 U.S.C. § 2314, tampering with a witness in violation of 18 U.S.C. § 1512, and conspiracy to launder money instruments in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i), and 1956(h).

On April 29, 1999, the district court convicted Chilingirian of conspiracy to commit money laundering. On October 8, 1999, Chilingirian filed a Motion and Brief requesting bail pending appeal. On October 18, 1999, Chilingirian's request for bail was denied and he was sentenced to 37 months imprisonment, 2 years supervised release, and restitution in the amount of $335,167.50. On appeal, Chilingirian argues that the district court's denial of his motion for bail violated his constitutional rights. He also argues that the district court's acquittal of him on certain offenses was inconsistent with the court's verdict of guilty on the conspiracy to commit money laundering charge. Further, Chilingirian alleges that certain counts within the indictment charged the same offense and, thus, the indictment was multiplicitous. On cross-appeal, the government alleges that the district court erred by sentencing Chilingirian according to the fraud guidelines.

II. STANDARD OF REVIEW

This court reviews a district court's denial of bail under an abuse of discretion standard. *Lee v. Jabe,* 989

F.2d 869, 871 (6th Cir.1993). The Bail Reform Act, 18 U.S.C. § 3143(b), creates a presumption against release pending appeal. *United States v. Vance,* 851 F.2d 166, 168 (6th Cir.1988).

This Court reviews for clear error a district court's factual findings in its application of the Sentencing Guidelines. *See United States v. Jones,* 159 F.3d 969, 980 (6th Cir.1998) (citing *United States v. Winston,* 37 F.3d 235, 240 (6th Cir.1994)). However, the district court's legal application of the guidelines is reviewed *de novo. See United States v. Moses,* 106 F.3d 1273, 1277 (6th Cir.1997). This Court reviews the question of whether there was an amendment to the indictment *de novo. United States v. Robison,* 904 F.2d 365, 368 (6th Cir.), *cert. denied,* 498 U.S. 946, 111 S.Ct. 360, 112 L.Ed.2d 323 (1990).

III. ANALYSIS

A. Bail Reform Act

The district court denied Chilingirian's motions for release on bail pending appeal. The lower court found that although the defendant did not pose a risk of flight or danger, his appellate issues were not substantial. The Supreme Court also subsequently denied Chilingirian's application for release pending bail. *Chilingirian v. United States,* 531 U.S. 1064, 121 S.Ct. 752, 148 L.Ed.2d 656 (2001).

Title 18 U.S.C. § 3143(b) [The Bail Reform Act of 1984] requires a district court to make two findings before granting bail pending appeal. To establish entitlement to release pending appeal, defendant must show 1) by clear and convincing evidence, that he is not likely to flee or pose a danger to the safety of another person or the

community, and 2) that the appeal is not for delay and raises a substantial question of law or fact likely to result in reversal, an order for new trial, or a sentence that does not include a term of imprisonment. 18 U.S.C. §§ 3143(b); *United States v. Pollard,* 778 F.2d 1177, 1181 (6th Cir.1985).[2] In this case, release on bail was denied because defendant failed to show that the appeal raised a substantial question of law.

On appeal, Chilingirian argues that 18 U.S.C. § 3143(b) violates the Due Process Clause of the Fifth Amendment and the Eighth Amendment. Chilingirian argues that denying a convicted incarcerated defendant's bail motion and forcing the defendant to wait for the hearing panel's decision is a violation of an individual's due process rights under the Fifth Amendment. In addition, he argues that denial of bail for the primary purpose of punishing the defendant is unreasonable and violates the Eighth Amendment. However, Chilingirian has not identified a single case in which any court has held that the Bail Reform Act of 1984 is unconstitutional. To the contrary, this Court and others have generally upheld the Act against constitutional challenges. For instance, in *Pollard,* this Court held that "the Bail Reform Act of 1984 does not violate a defendant's procedural due process rights by requiring the district court to determine that an appeal raises a substantial issue before granting bond pending appeal." 778 F.2d at 1182; *see also United States v.*

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[2] In addition to reversal or a new trial, the substantial question of law can be likely to result in: "(iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 1343(b).

Perry, 788 F.2d 100, 111 (3d Cir.), *cert. denied,* 479 U.S. 864, 107 S.Ct. 218, 93 L.Ed.2d 146 (1986) (federal courts that have addressed the issue have held that there is no absolute right to bail); *United States v. Portes,* 786 F.2d 758, 766 (7th Cir.1985) (neither the historical evidence nor contemporary fundamental values implicit in the criminal justice system requires recognition of the right to bail as a "basic human right," which must then be construed to be of constitutional dimensions); *United States v. Giangrosso,* 763 F.2d 849, 851 (7th Cir.1985) (holding that Bail Reform Act would not violate the Eighth Amendment and/or due process guarantees even if the standard for granting bail pending appeal involves the question of whether the lower court is likely to be reversed). We do not see any constitutional problems with this Act, and, likewise, Chilingirian has not raised any.

B. Inconsistency of Verdicts

The district court acquitted Chilingirian on all counts of the indictment except Count 33 – Conspiracy to Launder Monetary Instruments in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i), and 1956(h). Chilingirian argues that his acquittal on the mail and wire fraud counts, and conspiracy to commit mail and wire fraud under 18 U.S.C. § 371, was inconsistent with the court's guilty verdict on Count 33. The question of whether an inconsistent verdict rendered by a judge is reviewable, or grounds for reversal or a new trial, has not been resolved in this circuit.

The Supreme Court has held that "a criminal defendant convicted by a jury on one count could not attack that conviction because it was inconsistent with the jury's

verdict of acquittal on another count." *United States v. Powell,* 469 U.S. 57, 58, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984) (citing *Dunn v. United States,* 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932)). This rule applies even where the jury acquits a defendant of a predicate felony at the same time as it convicts on the compound felony. *See id.* at 67-69, 105 S.Ct. 471.

Chilingirian, however, was tried to the bench. He argues that inconsistent verdicts rendered by a judge are reviewable as a check against arbitrary exercises of power. He relies primarily on *United States v. Maybury,* 274 F.2d 899 (2d Cir.1960), and *United States v. Duz-Mor Diagnostic Lab., Inc.,* 650 F.2d 223 (9th Cir.1981). Neither case is persuasive.

At trial, the government suggested that if Chilingirian conspired to launder money, then he also conspired to defraud. Defendant asserts that these findings are incompatible with the theory of the case and must be reconciled with the evidence presented. Consequently, he argues that the guilty verdict on the money laundering count should have been vacated and the district court should have entered his motion for acquittal on that charge.

In *Harris v. Rivera,* 454 U.S. 339, 102 S.Ct. 460, 70 L.Ed.2d 530 (1981), the Supreme Court considered the question of inconsistent verdicts rendered by a trial judge. The Court acknowledged the general rule that "[i]nconsistency in a verdict is not a sufficient reason for setting it aside" and rejected the contention that "a different rule should be applied to cases in which a judge is the finder of fact." *Id.* at 345, 102 S.Ct. 460. However, *Harris* is a case of collateral review. The defendant had been convicted in state court and had submitted a petition for a

writ of habeas corpus in federal court, arguing that his guilty verdict was inconsistent from his co-defendant's acquittal. Thus, the Court was limited to looking for a constitutional violation and specifically noted that "this case does not raise any question concerning the significance that an appellate court may attach to an apparent inconsistency in a verdict that is subject to review on direct appeal." *Id.* at 462-63.

Nonetheless, the Court's rationale that inconsistencies alone should not be the sole basis for setting aside a court's finding is still applicable here. The Court explained that inconsistent verdicts could result when:

> the judge's actual observation of everything that transpired in the courtroom created some doubt about the guilt of one defendant that he might or might not be able to articulate in a convincing manner. In this case, if the judge was convinced beyond a reasonable doubt that [two defendants] were both guilty, it would be most unfortunate if a concern about the plausibility of a lingering doubt about [a third defendant] should cause him to decide to convict all three rather than to try to articulate the basis for his doubt.

Id. at 347, 102 S.Ct. 460. Moreover, an apparent inconsistency in a trial judge's verdict does not give rise to an inference of irregularity in his finding of guilt that is sufficiently strong to overcome the presumption that the judge adhered to basic rules of procedure. *Id.*

Both prior and subsequent to *Harris,* other circuits have held that inconsistent verdicts rendered by a judge provide no greater grounds for reversal than inconsistent verdicts rendered by a jury. *See, e.g., United States v. West,* 549 F.2d 545, 553 (8th Cir.1977) ("adher[ing] to the general

rule that consistency between the verdicts on a multiple-count indictment is unnecessary when a defendant is convicted on one or more counts but acquitted on the remainder."); *United States v. Wright,* 63 F.3d 1067, 1074 (11th Cir.1995) (holding "inconsistent verdicts, whether provided by juries or judges, are not subject to reversal merely because they are inconsistent."). We agree with the reasoning of those circuits.

C. Amendment to the Indictment

Chilingirian argues that the trial court's general finding of not guilty on the mail and wire fraud counts within Count 33 renders the judge's verdict fatally defective. Specifically, he alleges that the failure to establish the elements of mail and wire fraud mandates that the verdict must be reversed because the guilty finding rests upon an impermissible amendment of the indictment. He further argues that this error gave the government a wider and unlawful berth and lessened the government's burden in establishing the act elements as charged in Count 33.

The Fifth Amendment guarantees that an accused be tried only on those offenses presented in an indictment and returned by a grand jury. U.S. Const. amend. V; *Stirone v. United States,* 361 U.S. 212, 217-19, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). "[T]he constitutional rights of an accused are violated when a modification at trial acts to broaden the charge contained in an indictment." *United States v. Ford,* 872 F.2d 1231, 1235 (6th Cir.1989). "A *variance* [to the indictment] occurs when 'the charging terms [of the indictment] are unchanged, but the evidence at trial proves facts materially different from those alleged

in the indictment.' In contrast, an *amendment* involves a change, whether literal or in effect, in the terms of the indictment." *United States v. Barrow,* 118 F.3d 482, 488 (6th Cir.1997) (emphasis added). "This Circuit has held that a variance rises to the level of a constructive amendment when the terms of an indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment." *Id.; see also United States v. Atisha,* 804 F.2d 920, 927 (6th Cir.1986) (explaining that a constructive amendment occurs when "there has been a modification at trial in the elements of the crime charged"). The defendant has the burden of proof on this issue. *Barrow,* 118 F.3d at 489.

While the distinction between a variance and a constructive amendment is sketchy, the consequences of each are significantly different. A variance will not constitute reversible error unless "substantial rights" of the defendant have been affected. *United States v. Hathaway,* 798 F.2d 902, 910 (6th Cir.1986). A constructive amendment, on the other hand, is "a variance that is accorded the per se prejudicial treatment of an amendment," because, like an actual amendment, it infringes upon the Fifth Amendment's grand jury guarantee. *See Ford,* 872 F.2d at 1235. Consequently, a constructive amendment warrants reversal of a conviction. *See id.* The defendant has the burden of proving that the variance in question rose to the level of a constructive amendment. *See United States v. Blandford,* 33 F.3d 685, 701 (6th Cir.), *cert. denied,* 514 U.S. 1095, 115 S.Ct. 1821, 131 L.Ed.2d 743 (1995).

We conclude that Chilingirian's indictment was not broadened by the district court's guilty verdict on conspiracy to launder money even though there were acquittals on the fraud counts. The indictment listed mail and wire fraud as the unlawful activities that generated the proceeds that Chilingirian conspired to launder. But, according to the money laundering statute, a defendant can be guilty of money laundering as long as he knew that his transactions involved proceeds of some unlawful activity – he does not have to know what form the unlawful activity took. Therefore, while the money did have to have come from the specified unlawful activity of wire and mail fraud, Chilingirian did not have to know that this was an element of the charged offense. Given that Chilingirian did not have to be aware of this element, it would be illogical to conclude that Chilingirian himself actually had to have committed that unlawful activity.

In sum, proving that Chilingirian committed mail and wire fraud was never essential to proving that he conspired to launder money. Therefore, a conviction for the latter at the same time as an acquittal on the former did not result in an amendment to the indictment.

D. Multiplicity, double jeopardy and special findings

Chilingirian argues that Count 33 – conspiracy to commit money laundering-and Count 1 – § 371 fraud conspiracy – charged the same conspiracy, and thus the indictment was multiplicitous. A claim that an indictment is multiplicitous should be raised before trial. Fed.R.Crim.P. 12(b)(2). Chilingirian did not raise this claim until his appeal to this court. Thus, the claim made

is not timely. *See United States v. Hart,* 70 F.3d 854, 859-60 (6th Cir.1995).

Chilingirian further argues that when the court acquitted him on the § 371 conspiracy charge, the double jeopardy clause precluded the court from convicting him on the money laundering charge. The double jeopardy clause protects against successive prosecutions for the same crime and against multiple punishments for the same crime. *See Missouri v. Hunter,* 459 U.S. 359, 365, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983); *United States v. Sharpe,* 996 F.2d 125, 130 (6th Cir.1993). "[T]he protection against multiple prosecutions is not implicated when a defendant faces multiple charges in a single proceeding." *United States v. Barrett,* 933 F.2d 355, 360 (6th Cir.1991). Chilingirian was prosecuted on all of the charges in a single proceeding. He was convicted on only one count and sentenced only on that count. Thus, the double jeopardy clause is not implicated.

Finally, Chilingirian argues that his constitutional right to due process was violated by the district court's refusal to issue special findings. The court entered its general finding of not guilty on all of the counts except Count 33 on April 29, 1999. Later, on May 4, 1999, Chilingirian moved for special findings pursuant to Fed.R.Crim.P. 23. The court denied the motion because it was not made before the court entered its general finding. Rule 23 provides, "[I]n a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. . . . " Thus, the district court appropriately denied the motion. *See United States v. Gustafson,* No. 93-4247, 1994 WL 276883, at *3 (6th Cir. June 21, 1994).

E. Fraud Guideline or Money Laundering Guideline?

The government, on cross-appeal, argues that the district court erred by sentencing Chilingirian according to the fraud guidelines, rather than the money laundering guidelines. Chilingirian was found guilty of conspiracy to commit money laundering and Jack Rashid pleaded guilty to the same offense. However, Judge O'Meara sentenced the defendants according to different sentencing guidelines. He sentenced Jack Chilingirian according to the sentencing guideline for fraud (§ 2F1.1) and sentenced Jack Rashid according to the sentencing guideline for money laundering (§ 2S1.1). The fraud guideline results in a significantly lower offense level. The government argues that the court should have applied the guidelines for money laundering to Chilingirian.

This is a case of first impression in this circuit. Chilingirian and the district court rely on case law from the Third Circuit. In *United States v. Smith,* 186 F.3d 290 (3d Cir.1999), the Third Circuit held that the money laundering guidelines were too harsh to apply to what it described as a routine fraud case in which the money laundering activity was an "incidental by-product" of a kick-back scheme. *Id.* at 300. The court explained that the sentencing court must perform a "heartland" analysis when deciding what guideline should be applied and when deciding whether to depart. *See id.* at 298. Thus, in order to determine whether the money laundering guideline should apply, the court had to determine what conduct was considered by the Sentencing Commission to fall within the heartland cases covered under the money laundering guideline. The court considered the Sentencing Commission's proposed amendments to the money laundering

guideline, which were rejected by Congress, and "conclude[d] that the Sentencing Commission itself has indicated that the heartland of U.S.S.G. § 2S1.1 is the money laundering activity connected with extensive drug trafficking and serious crime." *Id.* at 300.

The Third Circuit has since clarified the holding of *Smith:*

> Where money laundering is not 'minimal or incidental,' and is 'separate from the underlying crime' and intended to 'make it appear that the funds were legitimate' or to funnel money into further criminal activities, § 2S1.1 is an applicable guideline. The guideline may also be applicable if there is evidence that the activities which fulfilled the broad statutory requirements for money laundering were extensive with drug trafficking or other serious crime.

United States v. Mustafa, 238 F.3d 485, 495 (3d Cir.2001) (quoting *United States v. Bockius,* 228 F.3d 305, 313 (3d Cir.2000)). In this case, it could also be argued that even if this Circuit were to apply *Smith,* its rationale would fail to produce the result desired by Chilingirian. The money laundering in this case was not minimal nor incidental, and it appears to have been funneled through the client trust account in order to make it appear legitimate and to further the radar technology/fraud scheme.

The Third Circuit relied on U.S.S.G. Appendix A (1999), which states "[i]f, in an atypical case, the guideline section indicated for the statute of conviction is inappropriate because of the particular conduct involved, use the guideline section most applicable to the nature of the offense conduct charged in the count of which the defendant was convicted." Similarly, this court has previously

relied on this language and held that the district court must decide which guideline is most applicable considering the facts involved. *See United States v. Hood,* 210 F.3d 660, 664 (6th Cir.2000).

This portion of the Guidelines Manual has since been amended so that the sentencing court is now required to use the guideline that Appendix A says is applicable. *See* U.S.S.G., Appendix A (2000). Thus, the *Smith* approach is no longer relevant.

Whether this court views the district court's action as a choice between guidelines or a departure, the result is the same. The heartland analysis that should be applied prior to determining which guideline applies is identical to the analysis that should be applied in determining whether a departure is warranted. *See Smith,* 186 F.3d at 298. Moreover, in the departure context, this court has held that the fact that a money laundering offense involved proceeds related to unlawful activity other than drug trafficking or organized crime is not sufficient to take the offense outside of the heartland of the money laundering guideline. *United States v. Reed,* 167 F.3d 984, 995 (6th Cir.1999); *United States v. Ford,* 184 F.3d 566, 587 (6th Cir.1999). Thus, even if the district court's decision is treated not as a departure but as an application of a more appropriate guideline, the district court's rationale was not sufficient to warrant the lower court's decision not to apply the money laundering guideline to the money laundering offense. Accordingly, the district court's sentence should be reversed and remanded with instructions to re-sentence Chilingirian in accordance with the money laundering guideline.

IV. CONCLUSION

For the reasons stated above, we REVERSE the district court's sentencing order and REMAND the case to the district court with instructions to re-sentence Jack Chilingirian in accordance with the money laundering guideline. We AFFIRM the remainder of the district court's judgment.

NOT FOR PUBLICATION

No. 02-1695

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN**
Plaintiff-Appellee,	
v.	
JACK C. CHILINGIRIAN,	(Filed Apr. 9, 2004)
Defendant-Appellant.	

BEFORE: SUHRHEINRICH and CLAY, Circuit Judges; and GWIN, District Judge.*

SUHRHEINRICH, J. Defendant-Appellant Jack Chilingirian ("Defendant") appeals from his resentencing upon remand. In this appeal he challenges the eighty-seven month sentence imposed. For the reasons that follow, we reverse and remand.

I. Background

The case was previously heard in this Court and remanded for resentencing. *See United States v. Chilingirian,* 280 F.3d 704 (6th Cir. 2002). We incorporate the facts of the case by reference here, and supplement as necessary.

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* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

On April 29, 1999, after a bench trial, the district court found Defendant guilty as to one count of conspiracy to launder monetary instruments in violation of 18 U.S.C. § 1956(a) & (h) ("Count 33").[1] The presentence report ("PSR") used the money laundering guideline, U.S.S.G. § 2S1.1 (1998), which called for a base offense level of 23, plus five levels as the value exceeded $1,000,000.00. With a total offense level of 28 and a Criminal History Category I, the PSR recommended a guideline range of seventy-eight to ninety-seven months. Instead, the district court used the fraud guideline, U.S.S.G. § 2F1.1, and calculated

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[1] Count 33 of the Third Superseding Indictment provides as follows:

COUNT THIRTY THREE

(18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i), and 1956(h) – CONSPIRACY TO LAUNDER MONETARY INSTRUMENTS)

. . .

That from in or about December of 1994 through in or about October of 1996, in the Eastern District of Michigan, Southern Division, and elsewhere, defendant **Jack Rashid** and defendant **Jack Chilingirian**, knowing that the property involved represented the proceeds of some form of unlawful activity, as defined in Title 18, United States Code, Section 1956(c)(1), did knowingly, intentionally and unlawfully combine, conspire, confederate and agree with other persons whose names are known and unknown to the Grand Jury, to conduct and cause to be conducted financial transactions affecting interstate and foreign commerce which involved the proceeds of specified unlawful activity, that is, mail and wire fraud, felonies under Title 18, United States Code, Sections 1341 and 1343, with the intent to promote the carrying on of specified unlawful activity, and knowing that the transactions were designed in whole or in part to conceal and disguise the nature, location, source, ownership and control of the proceeds of such unlawful activity; all in violation of Title 18, United States Code, Sections 1956(a)(1)(A)(i), 1956(a)(1)(B)(i) and 1956(h).

. . . .

All in violation of Title 18, United States Code, Section 1956(h).

(emphasis in original).

a total offense level of 20 and Criminal History Category I, which resulted in a guideline range of thirty-three to forty-one months. The district court imposed a term of thirty-seven months' imprisonment, two years of supervised release, and restitution in the amount $335,167.50. Defendant appealed on various grounds. The Government filed a cross-appeal, challenging the district court's use of the fraud guideline, U.S.S.G. § 2F1.1, instead of the sentencing guideline for money laundering, § 2S1.1. This Court rejected Defendant's challenges to his conviction and sentence. However, regarding the cross-appeal, we determined that money laundering guidelines should have been used in imposing sentence in light of the fact that "[t]he money laundering in this case was not minimal nor incidental, and it appears to have been funneled through the client trust account in order to make it appear legitimate and to further the radar technology/fraud scheme." *Chilingirian,* 280 F.3d at 714. We remanded with instructions to resentence Defendant in accordance with the money laundering guideline. *Id.*

On April 9, 2002, after remand, the probation office supplemented the original presentence report ("SPSR"). The SPSR noted that, on remand, the first task was to determine which version of the guidelines to apply. The SPSR noted that the last date of the offense of conviction is the controlling date for *ex post facto* purposes. *See* U.S.S.G. § 1B1.11 (providing that the district court shall use the Guidelines Manual in effect on the date the defendant is sentenced, unless its application would violate the *ex post facto* clause, in which case the last date of the offense of conviction is controlling). Here, the offense conduct for Count 33 ended in October 1996, thus the 1995 edition of the Guidelines Manual and the 2001 version

would be the two applicable versions. The SPSR calculated Defendant's sentence under both editions. The SPSR calculated a total offense level of 29 under § 2S1.1 of the 1995 guidelines, and a total offense level of 32 under § 2S1.1 of the 2001 version. Because it produced a more favorable guideline level, the SPSR used the 1995 guideline. Thus, with a total offense level of 29 and a Criminal History Category I, the guideline range was eighty-seven to one hundred eight months.

Defendant filed objections to the SPSR. The district court held a resentencing hearing on May 23, 2002. Over Defendant's objection, the court applied the 1995 version of the guidelines.

The district court next ruled that the amount of laundered funds was $2.7 million. The court also rejected Defendant's attack on the restitution order. The court set the total offense level at 29. Combined with a Criminal History Category score of I, the guideline range was eighty-seven to one hundred-eight months. The district court resentenced Defendant to a custodial term of eighty-seven months, all other terms to remain unchanged from the original judgment. Defendant filed his *pro se* notice of appeal.

Defendant, represented by counsel, presents three issues on appeal: (1) whether Defendant's statutory sentence of eighty-seven months violates *Apprendi v. New Jersey,* 530 U.S. 466 (2000), and *Ring v. Arizona,* 536 U.S. 584 (2002); (2) whether the district court erred in calculating Defendant's sentence; and (3) whether the district court erred in requiring Defendant to pay restitution.

II. Analysis

A. *Apprendi*

The gist of Defendant's first argument is as follows. The offense-defining statute, 18 U.S.C. § 1956, has a maximum sentence of twenty years. However, the operation of the offense-defining statute in conjunction with § 2S1.1 of the sentencing guidelines results in a relevant maximum sentence of twelve months. The guidelines must be considered in determining the relevant maximum sentence because 18 U.S.C. § 3553(a)(4)(A) mandates the application of the sentencing guidelines. In other words, every factor which increases a defendant's sentence, including the application of the guideline sentencing enhancements, must be charged in the indictment and proven to a jury beyond a reasonable doubt.

In *Apprendi,* the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory *maximum* must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi,* 530 U.S. at 490 (emphasis added). In *Harris v. United States,* 536 U.S. 545 (2000), the Supreme Court held that anything that increases the statutory *minimum* is a sentencing factor and not an element, and not subject to the rule of *Apprendi.* The majority in *Harris* stated in relevant part:

> [w]hether chosen by the judge or the legislature, the facts guiding judicial discretion *below the statutory maximum* need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. When a judge sentences the defendant to a mandatory minimum, no less than when the judge chooses a sentence within the range, the grand and petit juries already

> have found all the facts necessary to authorize the Government to impose the sentence. The judge may impose the minimum, the maximum, or any other sentence within the range without seeking further authorization from those juries – and without contradicting *Apprendi*.

Id. at 565 (emphasis added).

Relying on *Harris,* this Court has already ruled *Apprendi* does not apply to sentencing enhancements within the guideline range. *United States v. Stines,* 313 F.3d 912, 916 (6th Cir. 2002) (stating that "[a]lthough it is true that the quantity determined by the district court elevated the mandatory guideline minimum sentence, *Harris* tells us that *Apprendi* does not invalidate that increase"; holding that sentencing enhancements based on drug type and quantity factors did not affect the statutory maximum and therefore *Apprendi* was not implicated); *see also United States v. Copeland,* 321 F.3d 582, 603 (6th Cir. 2002) (same); *United States v. Wilson,* 249 F.3d 366, 380 (5th Cir. 2001) (rejecting the defendant money-launderer's argument that an enhancement under the money laundering guideline based on the value of funds laundered must be submitted to the jury; upholding the twenty-year sentence imposed by the district court).

Ring, issued the same day as *Harris,* does not support Defendant's argument. *Ring* was a capital sentencing case. The Arizona statute made first degree murder punishable by life imprisonment or death. However, the death penalty could be imposed only in accordance with a separate state statute which required further fact findings to be made by the judge alone. The Supreme Court held that, because the aggravating factors increased the available sentence from life in prison to death, they could not be found by the trial

judge but had to be determined by the jury. *Ring*, 536 U.S. at 609. *Ring* is therefore distinguishable.

In short, this contention is without merit.

B. Sentence Calculation

Defendant argues in the alternative that the district court miscalculated his offense level under both the 1995 and 2001 Guidelines. Specifically, Defendant argues that his guideline range, rather than being computed at level 29 under the 1995 version, or 32 under the 2001 version, should have been calculated at level 26 under both versions. He makes several arguments in support of each.

1. 1995 Guidelines

As noted, Defendant claims that his total offense level under the 1995 guideline should have been 26, not 29, because his conviction should be construed as a *conspiracy* to commit money laundering under 18 U.S.C. § 1956(h), not the *substantive* offense of money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i). Defendant therefore claims that the district court should have applied § 2S1.1(a)(2) for a base level of 20 for other violations of 18 U.S.C. § 1956, because he was found guilty only of conspiracy to launder monetary instruments, in violation of 18 U.S.C. § 1956(h). Instead, the district court determined Defendant's base offense level by applying § 2S1.1(a)(1).

The 1995 version provides in relevant part as follows:

(a) Base Offense Level:

(1) 23, if convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A);

(2) 20, otherwise.

(b) . . .

. . .

(2) If the value of the funds exceeded $100,000, increase the offense level as follows:

Value (Apply the greatest)	Increase in Level
. . .	
(F) More than $1,000,000	add 5
(G) More than $3,500,000	add 6

. . .

U.S.S.G. § 2S1.1 (1995).

We find no error. Under § 1956(h), "[a]ny person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy." 18 U.S.C.A. § 1956(h) (West 2003). Thus, in determining Defendant's sentence, we look to the object offense and use its base offense level. *See United States v. Haehle,* 227 F.3d 857, 862 (7th Cir. 2000) (stating that "for a person who conspires to violate § 1956(a)(1)(A), the sentence under § 1956(h) must be the same as for the person who commits the substantive offense"; similarly, "[f]or a person who conspires to violate § 1956(a)(1)(B), the sentence follows that substantive offense"); *see also id.* at 861-62 (rejecting the defendant's argument that the use of level 23 was wrong because he pleaded guilty to a violation of § 1956(h), not § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A)).

Count 33 explicitly charged Defendant and Jack Rashid with engaging in a conspiracy to both promote and conceal the proceeds of their fraudulent radar technology

scheme through the use of client trust accounts established by Defendant for this purpose. The indictment twice specifically referenced "Title 18, United States Code, Sections 1956(a)(1)(A)(i), 1956(a)(1)(B)(i) and 1956(h)." In its "General Finding Pursuant to Rule 23," the district court specifically found Defendant guilty of the charge of "COUNT THIRTY-THREE (18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i), and 1956(h) – CONSPIRACY TO LAUNDER MONETARY INSTRUMENTS)." The amended judgment states that Defendant was found guilty of "18 USC 1956(a)(1)(A)(I), 1956(a)(1)(B)(I), and 1956(h)." Finally, at resentencing, the district court specifically noted that "[o]n April 29, 1999, the Court issued a general finding pursuant to Rule 23 finding the defendant guilty of Count 33, alleging a violation of – the following sections of – 18 U.S.C. 1956(a)(1)(A)(i), 1956(a)(1)(B)(i), and 1956(h)." Thus, the district court correctly looked to § 1956(a)(1)(A)(i) and § 1956(a)(1)(B)(i), the object offenses of the conspiracy count in determining the base offense level for Defendant's conviction under § 1956(h).

The district court also did not err in using the base offense level of 23 set forth in § 2S1.1(a)(1), based on the violation of § 1956(a)(1)(A)(i), rather than the base offense level of 20 under § 2S1.1(a)(2), based on the violation of § 1956(a)(1)(B)(i). Section 1B1.2(d) states that "a conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." U.S.S.G. § 1B1.2(d) (1995). The commentary explains that

> [s]ubsection (d) provides that a conviction on a conspiracy count charging conspiracy to commit

> more than one offense is treated as if the defendant had been convicted of a separate conspiracy for each offense that he conspired to commit. For example, where a conviction on a single count of conspiracy establishes that the defendant conspired to commit three robberies, the guidelines are to be applied as if the defendant had been convicted on one count of conspiracy to commit the first robbery, one count of conspiracy to commit the second robbery, and one count of conspiracy to commit the third robbery.

U.S.S.G. § 1B1.2, cmt. n.4 (1995).[2]

Thus, here, for sentencing purposes it was proper to treat Defendant as having been convicted of one count of conspiracy to commit a violation of § 1956(a)(1)(A)(i), and one count of conspiracy to commit a violation of § 1956(a)(1)(B)(i). Next, U.S.S.G. § 3D1.2(d) directs that we group together the "two counts." U.S.S.G. § 3D1.2(d) (stating that "[o]ffenses covered by [§ 2S1.1] are to be

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[2] Further support for this result derives from Application note 5 to § 1B1.2, which states that Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. *In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense.*

U.S.S.G. § 1B1.2, cmt. n.5 (1995) (emphasis added). *See United States v. Tocco*, 306 F.3d 279, 292-93 (6th Cir. 2002) (remanding for district court to determine whether acts of extortion alleged in connection with conspiracy conviction were relevant conduct; noting that § 1B1.2(d), cmt. n.5 was the applicable guideline given the jury verdict in the case), *cert. denied*, 123 S. Ct. 2573 (2003).

Here, the district court convicted Defendant of the object offense of § 1956(a)(1)(A)(i).

grouped under this subsection"). *See also* U.S.S.G. § 3D1.2, cmt. n.6 (stating that "[a] conspiracy . . . to commit an offense is covered under subsection (d) if the offense that is the object of the conspiracy . . . is covered under subsection (d)"). *See generally* U.S.S.G. ch 3, pt. D, introductory cmt. (1995) (stating that "[t]he rules in this Part are to be used to determine the offense level for such composite offenses [e.g. conspiracy] from the offense level for the underlying offenses"). Finally, U.S.S.G. § 3D1.3 directs that "[i]n the case of counts grouped together pursuant to § 3D1.2(d) . . . [w]hen the counts involve offenses of the same general type to which different guidelines apply, apply the offense guideline that produces the highest offense level." U.S.S.G. § 3D1.2(b) (1995). Here, the highest offense level is 23. In sum, the district court did not err in setting Defendant's base offense level at 23 rather than 20.

Defendant also asserts that Count 33 cannot be construed to charge substantive money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i) because it fails to describe sufficiently conduct that would constitute such a violation. He adds that the three paragraphs of that count parrot the language of 18 U.S.C. §§ 1956(a)(1)(A)(i) and (B)(i), without providing any reference to specific conduct by the defendants that would constitute violations of those provisions. Thus, he claims that this paragraph is insufficient to charge a violation of any part of 18 U.S.C. § 1956 because it fails to apprise him of the underlying conduct. In addition, Defendant argues that Count 33, as a single count, cannot constitutionally charge both violations of the substantive crime of money laundering *and* conspiracy to commit money laundering.

As the Government points out, the foregoing arguments are veiled attempts at arguing vagueness and

duplicity in the indictment, and should have been raised in pretrial motions rather than as sentencing issues. *See* Fed. R. Crim. P. 12(b)(3)(B); *United States v. Adesida,* 129 F.3d 846, 849 (6th Cir. 997) (holding that duplicity must be raised prior to trial or waived).

2. 2001 Guidelines

Defendant also claims that the district court miscalculated his sentence under the 2001 sentencing guidelines, to arrive at a total offense level of 32, rather than 26. He finds several errors. First, he contends that the district court calculated his base offense level under the wrong guideline because it erroneously found him responsible for the underlying mail and wire fraud. Second, he argues that the district court made a new, higher loss calculation than utilized at his initial sentencing, without any evidence to support the change. Third, he asserts that the district court erred in applying an enhancement for making a false statement during the course of a bankruptcy proceeding.

The 2001 version of § 2S.1.1(a) states:

> (a) Base Offense Level:
>
> > (1) The offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense (or would be accountable for the underlying offense under subsection (a)(1)(A) of § 1B1.3 (Relevant Conduct)); and (B) the offense level for that offense can be determined; or

> (2) plus the number of offense levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the laundered funds, otherwise.

U.S.S.G. § 2S1.1(a) (2001).

a. Relevant Conduct

At resentencing, over Defendant's objection, the district court sentenced Defendant under § 2S1.1(a)(1), reasoning that Defendant was responsible for the underlying mail and wire fraud under the Relevant Conduct provision, § 1B1.3(a)(1)(A). Defendant contends that the district court failed to make sufficient findings to hold him responsible for the underlying offense and thus application of § 2S1.1(a)(1) is unsupported by the record. Thus, Defendant claims that his base offense level should have been calculated under § 2S1.1(a)(2).

The SPSR noted that the underlying offense from which the laundered funds were derived is fraud. Stating that Defendant "committed the underlying offense or would be accountable for the underlying offense under the relevant conduct provisions of § 1B1.3(a)(1)(A)," the SPSR applied § 2S1.1(a)(1). Under the fraud guidelines, § 2B1.1, the base level is 6, plus eighteen levels for more than $2,500,000 in funds, § 2B1.1(b)(1)(J), plus four levels for more than fifty victims, § 2B1.1(b)(2)(B), and two levels as the offense involved a misrepresentation during the course of a bankruptcy proceedings, § 2B1.1(b)(7)(B). This resulted in a total offense level of 30. Because Defendant was convicted under § 1956(h), an additional two points were added, resulting in a base offense level of 32. *See id.*

Had Defendant been sentenced under § 2S1.1(a)(2), his base offense level would be 8, plus 18 for the value of funds involved, § 2B1.1(b)(1)(J), plus two more levels under § 2S1.1(b)(2)(B) because Defendant was convicted under 18 U.S.C. § 1956(h). This would set his total offense level at 28, with a corresponding sentencing range of seventy-eight to ninety-seven months. U.S.S.G., Ch. 5, Pt. A (2001). Thus, the sentencing range would be lower than that obtained under the 1995 version, and it would be possible for Defendant to receive less than eighty-seven months, his current sentence.

Section 1B1.3(a)(1)(A) makes a defendant accountable for "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant." At the time of Defendant's resentencing, Fed. R. Crim. P. 32(c)(1) provided that "[a]t the sentencing hearing . . . [f]or each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing." Fed. R. Crim. P. 32(c)(1).[3] This

[3] On December 1, 2002, amendments to the Federal Rules of Criminal Procedure replaced Rule 32(c)(1) with Rule 32(i)(3). Rule 32(i)(3)(B) states that "for any disputed portion of the presentence report or other controverted matter" during sentencing, the court must "rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing." Fed. R. Crim. P. 32(i)(3) (2003). "This new rule attempts to address confusion in the courts over whether, under the prior rule, they were required to make rulings on every objection to the presentence report or only those that potentially would affect the sentence." *United States v. Treadway*, 328 F.3d 878, 885 n.3 (6th Cir. 2003) (citing advisory committee's notes to Fed. R. Crim. P. 32(i)(3)), *cert. denied*, 124 S. Ct. 1[illegible] (2003). Prior to these revisions, the Sixth Circuit had interpreted the rule in a manner consistent with Rule

(Continued on following page)

Court requires sentencing courts to make independent findings on any controverted matters. *United States v. Tackett,* 113 F.3d 603, 613 (6th Cir. 1997). This Court requires "'literal compliance' with this provision." *Id.* When the district court fails to make a factual finding, "this court must remand for resentencing." *United States v. Edgecomb,* 910 F.2d 1309, 1313 (6th Cir. 1990).

In response to Defendant's objection, the district court ruled as follows:

> Objection 5 of the defendant is overruled on the law. And I make as to objection 5 the following comment. As the defendant was involved in the underlying offense and the facts in this case show that he either committed, aided or abetted, counseled, commanded, induced, procured, or wilfully caused the underlying offense, guideline of Section 2S1.1(a)(2) cannot be utilized in setting the base offense level.

The Government claims that the record supports sentencing Defendant under § 2S1.1(a)(1) as a direct money launderer for purposes of calculating his offense level under the 2001 guidelines. However, the district court's conclusory statement fails to meet Rule 32's requirement of independent or particularized findings of fact. *See United States v. Osborne,* 291 F.3d 908, 911-12 (6th Cir. 2002) (district court's summary acceptance of presentence report was insufficient to dispose of the defendant's challenge to presentence report's finding holding him responsible for a specified amount of methamphetamine); *United States v. Corrado,* 227 F.3d

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32(i)(3)'s clarification. *United States v. Darwich,* 337 F.3d 645, 666 (6th Cir. 2003).

528, 540-41 (6th Cir. 2000) (holding that district court erred in failing to set out findings as to any of the controverted issues; noting that the district court "either summarily adopted the findings of the presentence report or simply declared that the enhancement in question was supported by a preponderance of the evidence"); *Tackett,* 113 F.3d at 614 (holding that mere recitation of the presentence investigation report's findings does not satisfy Rule 32 and that the record must reflect an independent evaluation of the evidence). Upon remand, the district court will have to conform its ruling on this aspect of its sentencing calculation to the dictates of Rule 32 and our caselaw.

b. Amount of Funds

Next, Defendant argues that the district court erred in setting the value of funds at $2.7 million under the 2001 guidelines at resentencing. At the initial sentencing the Government alleged, and the district court found, that Defendant was responsible for $2.267 million in laundered funds. Defendant alleges that this Court's earlier remand for resentencing was not a general remand. Second, he argues that the sentencing court failed to provide objective reasons for imposing a more stringent sentence at resentencing, without providing an objective basis for doing so.

Under the 1995 version of the guideline, a specific-offense enhancement of six is required where the amount of laundered funds is between $2 million and $3.5 million. U.S.S.G. § 2S1.1(b)(2)(G) (1995). Thus, the precise amount of the funds in excess of $2 million was not relevant. However, under the 2001 money laundering guideline, the cross-reference to the calculations set forth in § 2B1.1 now

contains a break between $1 million (sixteen-level increase) and $2.5 million (eighteen-level increase). Thus, the Government filed a resentencing memorandum, with exhibits, establishing the total amount of money laundered through both of Defendant's trust accounts as totaling over $2.7 million.[4]

Even if we consider the issue, Defendant's claim should fail. To begin, our remand order simply states that "we **REVERSE** the district court's sentencing order and **REMAND** the case to the district court with instructions to re-sentence Jack Chilingirian in accordance with the money laundering guideline." *Chilingirian,* 280 F.3d at 714 (emphasis in original). In *United States v. Helton,* 349 F.3d 295 (6th Cir. 2003), we held that "[w]here [ ] 'an appellate court simply vacates a sentence and remands to the district court for 'resentencing, that order is considered a general one that allows the district court to resentence the defendant *de novo.*'" *Id.* at 299 (citations omitted). Further, even if it is deemed "a remand order that is limited by its terms to a discrete issue [and] the district court obtains jurisdiction to address only that issue," the "discrete" issue is proper application of the money laundering guidelines, of which the amount of funds is a component. *Id.* Defendant's argument is without merit.

We note that Fed. R. Crim. P. 32(c)(1) (now, Fed. R. Crim. P. 32(i)(3)(B)) requires that for any controverted issue, the district court make specific factual findings to support its conclusion. Here, the court satisfied this

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[4] It does not appear that Defendant actually challenges the $2.7 million dollar figure.

requirement. At the resentencing hearing, the district judge made the following findings of fact:

> The majority of the funds that the defendant is being held accountable for comes from the first client trust fund. The review of funds show payments of 345 thousand and some odd dollars to the defendant, $1,788,000 and some odd dollars to Jack Rashid, and 600 thousand and some odd dollars related to Rashid brought, for a total of two thousand – 2,736,052.

Defendant also argues that the district court was required to provide objective reasons for the increase in his sentence upon remand, citing *North Carolina v. Pearce,* 395 U.S. 711 (1969), *overruled on other grounds by Alabama v. Smith,* 490 U.S. 794 (1989). The district judge complied with this requirement, by citing objective information, such as the fact that co-conspirator Jack Rashid was found guilty of laundering $2.7 million. Also, on remand, the Government submitted a memorandum with a detailed financial spreadsheet supporting the higher figure. The district court clearly stated its reasons for the higher figure, and these reasons have objective support in the record.

c. False Statement

Defendant argues that the district court erred in applying a two-level enhancement for misrepresentation or fraudulent action made in the course of a bankruptcy proceeding under U.S.S.G. § 2B1.1(b)(7)(B) (2001). He argues that the district court did not apply the enhancement at the initial sentencing and therefore cannot apply it at resentencing. The offense level enhancement for misrepresentation

during a bankruptcy proceeding, U.S.S.G. § 2B1.1(b)(7)(B), did not exist until November 1, 2001.[5]

In the re-sentencing remand in 2002, Defendant never objected to the enhancement, before the district court. Under plain error review, it is not clear and obvious that the enhancement was erroneous. Defendant also attempts to invoke the *Pearce* requirement that the judge must cite objective reasons for increasing the sentence on remand. But it is not clear and obvious that this requirement applies in a case, such as the present one, where a defendant's appeal failed and the remand was granted solely on the basis of a successful cross-appeal by the government. *See Pearce*, 395 U.S. at 725 ("Due process of law, then, requires the *vindictiveness against a defendant for having successfully attacked his first conviction* must play no part in the sentence he receives after a new trial.") (emphasis added).[6]

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[5] Even though the enhancement was enacted after the offense was committed, Defendant did not make an *ex post facto* argument before this Court or the district court. Thus, even if, *arguendo*, this Court could consider the *ex post facto* issue, review would be under the plain error standard, which requires a clear and obvious error that affects substantial rights. *United States v. Clinton*, 338 F.3d 483, 487 (6th Cir. 2003). As stated in *United States v. Monus*, 356 F.3d 714, 718 (6th Cir. 2004), "clarifications of the guidelines have retroactive application while substantive changes do not." (citation omitted). It is not clear and obvious that § 2B1.1(b)(7)(B) constitutes a substantive change, as opposed to a mere clarification, of the prior U.S.S.G. § 2F1.1(b)(3)(B). There is no clear and obvious *ex post facto* violation.

[6] Although the *Pearce* language refers only to successful attacks to convictions, the *Pearce* requirement of objective reasons also applies to re-sentencing. *United States v. Flood*, 965 F.2d 505, 513 (7th Cir. 1992). But, as explained, it is not clear and obvious that the requirement would apply where, as here, Defendant's appeal of the sentence had failed.

C. Restitution

Defendant argues that the district court erred in imposing restitution in the amount of $335,167.50. The Government counters that Defendant waived the issue because he did not raise this objection at the time of his first sentencing in 1999.

Although the transcript of the original sentencing hearing does not reflect an explicit objection to the order of restitution, the Addendum to the Presentence Investigation Report filed on October 13, 1999, reveals that Defendant actually objected to the *amount* of restitution, claiming that it was "inaccurate."[7] On the other hand, at the original sentencing, defense counsel contended that "the correct amount of restitution in this case is $335,167.50" which represented only "checks that were issued from [Chilingirian's] trust account to [Chilingirian] personally." The district court assessed restitution in the same amount. Defendant did not challenge this amount on direct appeal. Having forfeited the claim in the previous appeal, it is not cognizable now. *See United States v. McKinley,* 227 F.3d 716, 718-19 (6th Cir. 2000); *cf. United States v. Hebeka,* 89 F.3d 279, 284-85 (6th Cir. 1996).

III. Conclusion

For the foregoing reasons, we **REVERSE** the district court's sentencing order and **REMAND** the case to the district court for the limited purpose of recalculating

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[7] Defendant also objected to the restitution order in briefs submitted to the court before resentencing. (Pro Se Motion by Chilingirian for Judgment of Acquittal, dated March 15, 2002, at 15).

Defendant's sentence under the 2001 version of the guidelines in accordance with this opinion. If that calculation results in a lower total offense level than the current calculation under the 1995 version, the district court is further instructed to resentence Defendant in accordance with the 2001 guideline. Otherwise, Defendant should be resentenced under the 1995 version. **SO ORDERED.**

GWIN, J., CONCURRING. I agree with the majority's disposition of this case and the lion's share of its reasoning. However, I write separately to explain why an apparent inequity of our decision is actually a mirage. First, the apparent inequity: Our decision permits the Government to challenge the district court's initial value of funds determination on remand, though the Government did not previously make the challenge, but forbids Chilingirian from challenging the district court's restitution order on remand. The majority does not address exactly why this apparently inequitable result is, in fact, correct. I explain the justification here.

We conclude that Chilingirian waived his challenge to the restitution order by not raising it in his initial appeal. This conclusion is correct. Our circuit's case law has identified "the general rule that when a party fails to seek review of a district court's final order, it is barred from reasserting that issue in any subsequent appeals occurring in that case." *United States v. McKinley,* 227 F.3d 716, 718 (6th Cir.2000). If this is correct, though, then why did the government not waive its challenge to the amount of funds involved?

United States v. Hebeka, 89 F.3d 279 (6th Cir. 1996), provides the answer. Under *Hebeka,* the *McKinley* rule does not apply where a party asserts on appeal an

argument that (1) the party had been unable to pursue during a previous appeal, but (2) later becomes logically relevant. *Id.* at 284-85. In this case, the district court applied the 1995 Guidelines during the original sentencing proceedings. These guidelines contain "breaks" in the value of funds determination at $2 million and $3.5 million. *See* USSG § 2S1.1(b)(2)(G)-(H) (1995). Any figure between these two breaks results in the same enhancement. For this reason, the Government lacked a ground to argue on appeal that the $2.267 million figure was inaccurate; even if this Court agreed, the additional funds included in the finding would have made no difference under the 1995 Guidelines. Thus, it was irrelevant under the 1995 Guidelines whether the correct value of funds was $2.267 million or $2.7 million.

On resentencing, however, the district court considered both the 1995 and 2001 Guidelines. The 2001 Guidelines contain a sentencing break at $2.5 million. *See* USSG § 2B1.1(b)(1)(J) (2002). The changes in the Guidelines made the difference between $2.267 million and $2.7 million relevant – the $2.267 million figure would result in a 16-level enhancement, whereas the $2.7 million figure would result in an 18-level enhancement. This new relevance, under *Hebeka,* prevents the *McKinley* waiver rule from applying in this case.

This result applies just the same if the tables were turned. Had the district court originally found the value of funds to be $2.7 million, *Hebeka* would permit Chilingirian to advocate for a figure of $2.267 million on this appeal. Therefore, the previously described "apparent inequity" is really no inequity at all, and need not cause any dyspepsia to readers or future defendants.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, -vs- **D-1 JACK RASHID,** **D-2 CHARLES RASHID,** **D-3 JACK CHILINGIRIAN,** Defendants. _____/	CRIMINAL NO. 96-80670 HON. JOHN CORBETT O'MEARA VIO: 18 U.S.C. § 371 18 U.S.C. § 982 18 U.S.C. §§ 1341, 2 18 U.S.C. §§ 1343, 2 18 U.S.C. § 1512 18 U.S.C. § 1956 18 U.S.C. § 1957 18 U.S.C. §§ 2314, 2

THIRD SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES:

GENERAL ALLEGATIONS

At all times pertinent to this indictment:

a. **Jack Rashid** and **Charles Rashid**, defendants herein, were corporate officers of Vehicle Radar Safety Systems, Inc. (VRSS), a company allegedly involved in the distribution of radar braking systems for use in automobiles and other forms of transportation. VRSS was located at 10 South Gratiot, Mr. Clemens, Michigan.

b. VRSS declared bankruptcy in January 1992. On or about August 29, 1994, the bankruptcy was converted to a Chapter 7 (liquidation) matter. The bankruptcy of VRSS was settled in December 1995.

c. After VRSS went bankrupt, **Jack Rashid** and **Charles Rashid** started a successor company called Advanced Radar Technologies, Inc. (ART). ART was incorporated on or about December 14, 1995, with facilities at 33272 Groesbeck, Fraser, Michigan. Like VRSS, ART was allegedly formed to "manufacture, distribute, market and sell collision warning systems and auto related electronic equipment."

d. **Jack Chilingirian**, defendant herein, is a lawyer who represented the **Rashids**, personally, and also represented the **Rashids'** corporate entities, VRSS, and ART. **Chilingirian** represented VRSS during its bankruptcy proceedings, and later represented ART, as well as **Jack Rashid**, in dealing with individuals who had provided funds to the **Rashids** and in developing ART's business. The incorporation records for ART list **Jack Rashid** as the incorporator and **Jack Chilingirian** as the resident agent.

e. Advanced Radar Technologies of Canada (ART-Canada) was incorporated on or about September 1, 1995, allegedly in order to facilitate investments from citizens of Canada in the radar technology held by ART and ART-Canada; **Jack Rashid** is the president and sole shareholder of ART-Canada.

COUNT ONE
(18 U.S.C. § 371 – CONSPIRACY)

D-1 JACK RASHID
D-2 CHARLES RASHID
D-3 JACK CHILINGIRIAN

1. The General Allegations are incorporated herein by reference.

2. That from approximately 1988 through approximately April 1997, in the Eastern District of Michigan, Southern Division, and elsewhere, **Jack Rashid**, **Charles Rashid**, and **Jack Chilingirian**, defendants herein, in part through the corporations Advanced Radar Technologies, Inc. (ART), Vehicle Radar Safety Systems, Inc. (VRSS), and Advanced Radar Technologies of Canada (ART-Canada), and with others known and unknown to the grand jury, did knowingly and willfully conspire and agree with each other to commit offenses against the United States, that is, to cause interstate and foreign wire communications and the use of the United States mails and interstate and foreign couriers, in the execution of a scheme to defraud and to obtain money and other things of value on the basis of false and fraudulent pretenses and representations, in violation of Title 18 United States Code, sections 1341 and 1343.

OBJECT OF THE CONSPIRACY AND SCHEME; GENERAL METHOD OF OPERATION

3. The object of the conspiracy and scheme was to obtain money and other things of value from numerous individuals throughout the State of Michigan, the United States and Canada, through a scheme to defraud, more fully set forth below, which involved personal contacts, interstate and foreign travel of victims and defendants, the use of interstate and foreign telephone calls and facsimiles, interstate wires and transfers of funds and the sending of funds and other items by the United States Postal Service and other interstate and foreign courier services.

4. It was part of the conspiracy and scheme that **Jack Rashid** and **Charles Rashid** (collectively referred to hereafter as the "**Rashids**"), defendants herein, while aiding and abetting each other, solicited and obtained money and other things of value from various individuals, and groups of individuals, by making false statements, and taking other steps calculated to persuade these individuals to invest in, or loan money to, VRSS, ART, and the **Rashid**. The solicitations were based upon false representations regarding monies the **Rashids** and their businesses had received or would be receiving due to alleged sales of their radar technology. Generally, the **Rashids** would solicit funds from a group of individuals through a contact person or persons, including, but not limited to, Gary Rudder, Joseph Hayden, Paul Tindall and Boyd Kraft; occasionally, the **Rashids** would solicit funds from individuals with no connection to a group. The **Rashids** would solicit funds from these groups or individuals at separate times but the false representations made to each group or individual were similar. Typically, **Jack Rashid**, accompanied by **Charles Rashid**, would make false statements to convince the groups or individuals that their loans/investments were secure; **Charles Rashid** furthered the false representations by explaining and demonstrating the technology. Sometimes, **Jack Rashid** alone would make the false representations. After the money was obtained, **Jack Chilingirian** worked to conceal the fraud, lull the individuals that provided funds, and prevent the early detection of the scheme, thereby causing the scheme to continue.

MANNER AND MEANS OF THE CONSPIRACY; THE SCHEME TO DEFRAUD

5. It was a further part of the conspiracy and scheme that the **Rashids** falsely represented that multi-million dollar contracts for the sale of their radar braking system, and related radar products, had been completed or nearly completed between themselves and/or their businesses and various major companies, including, but not limited to, Masco Corporation (hereinafter Masco), BMW, and North west Airlines. In fact, no such contracts existed nor were any such contracts close to being consummated.

6. It was a further part of the conspiracy and scheme that the **Rashids** falsely represented that major companies, including, but not limited to, Masco and BMW, had placed up to $250,000,000.00 in an escrow account with the National Bank of Detroit (hereinafter NBD) for the benefit of the individuals solicited by the defendants to provide funds, among others, based on the sale of the above products. In fact, no such escrow account ever existed.

7. It was a further part of the conspiracy and scheme that the **Rashids** falsely represented that the loans/ investments were guaranteed and would be repaid with extremely high rates of return from the funds held in escrow or received from the sale of the system/products.

8. It was a further part of the conspiracy and scheme that, in order to prevent detection of the scheme to defraud, the **Rashids** falsely represented to the individuals providing funds that the "contracts" with the major corporations were extremely confidential and that the "deal" could fall apart if these individuals told anyone about the

contracts or approached any of the parties to inquire about the contracts.

9. It was a further part of the conspiracy and scheme that, when the time arrived that some of the individuals who had provided funds were to receive their money or wanted their original investment back, the **Rashids** provided numerous false reasons to attempt to explain why they could not provide them with any money.

10. It was a further part of the conspiracy and scheme that the defendants, acting together, as well as individually, engaged in conduct to conceal the fraud, lull the individuals who had provided funds, and prevent the early detection of the scheme, thereby causing the scheme to continue, such acts being in furtherance of the conspiracy and the scheme to defraud. This part of the conspiracy and scheme was furthered as follows:

a. **Jack Rashid**, during the bankruptcy of VRSS, attempted to prevent the bankruptcy court from discovering that he had falsely represented to numerous individuals who had provided funds that the **Rashids** and their companies had completed contracts with Masco/BMW worth millions of dollars.

b. **Jack Chilingirian**, through his negotiations with the bankruptcy trustee's attorney, attempted to prevent the bankruptcy trustee from inquiring further about any Masco/BMW contracts and from providing information to federal criminal authorities about the Rashids.

c. **Jack Rashid**, when confronted with individuals who wanted their money back, would refer the individuals to his attorney, **Jack Chilingirian**, who, with

knowledge that the **Rashids** had taken the money under false pretenses, worked to pacify the individuals and lull them into believing that a major deal was likely but that, in the meantime, he would work to get them some money back from the **Rashids** if that is what they wanted.

d. **Jack Chilingirian,** in an effort to gain the trust of these individuals, would represent that he, too, felt like a victim, falsely representing that he had not been paid adequately by the **Rashids** and that he knew little or nothing about the source or amount of money that had been provided to the **Rashids**; in fact, at the time of these representations, **Jack Chilingirian** had already received, and continued to receive, substantial amounts of money from the **Rashids**, through **Jack Chilingirian**'s attorney client trust accounts at Comerica Bank (hereinafter attorney client trust accounts) and through other means.

e. **Jack Chilingirian**, while typically acknowledging to these individuals that no multi-million dollar deal existed with companies such as Masco and BMW, contrary to the assertions of the **Rashids**, attempted to prevent the individuals from pursuing civil or criminal actions against the **Rashids**, by suggesting that a major deal was nevertheless imminent and everyone would lose if they complained to authorities about the **Rashids**.

f. **Jack Chilingirian** and **Jack Rashid**, in negotiating with these individuals, or attorneys representing these individuals, who were demanding repayment, would demand the individuals sign affidavits indicating, among other things, that they had not been defrauded by **Jack Rashid**. As to some individuals, the affidavits demanded by **Jack Chilingirian** and **Jack Rashid** were false. **Jack Chilingirian** and **Jack Rashid** sought these

affidavits from individuals to prevent them from pursuing civil or criminal actions against the **Rashids** and to hinder investigations of the **Rashids** by governmental entities.

g. **Jack Chilingirian**, in the hopes of postponing or eliminating certain individuals' ability or desire to pursue civil or criminal actions against the **Rashids**, wrote checks or wired funds from his attorney client trust accounts to certain individuals. The majority of the funds available in the attorney client trust accounts came from loans and investments from individuals who had provided money to the **Rashids** on the basis of false representations.

h. **Jack Chilingirian**, in an effort to conceal the source and location of the funds placed in and disbursed from his attorney client trust accounts, and contrary to his obligations as a licensed attorney, did not keep accurate, complete and timely records of the deposits and withdrawals from the attorney client trust account.

i. **Jack Chilingirian**, in a further effort to conceal the source and location of the fraudulently obtained funds placed in and disbursed from the attorney client trust accounts, wrote out numerous checks from the attorney client trust account to **Jack Rashid** in increments of $10,000 or less. Subsequently, **Jack Rashid**, after having been introduced to bank personnel by **Jack Chilingirian**, caused these checks to be cashed or exchanged for cashier's check and money orders at a Comerica Bank, a bank where the **Rashids** had no account or previous business relationship.

OVERT ACTS

11. The following overt acts were committed or caused to be committed during and in furtherance of the conspiracy and scheme:

a. During in or about April 1-15, 1992, **Jack Rashid** provided Larry Cheek with fraudulent letters from Siemens Automotive confirming a contract dated February 26, 1992, between Siemens and **Jack Rashid** and that Siemens would be making a payment of $40,000,000.00 in May 1992 into an account specified by **Jack Rashid**.

b. At a meeting at the office of a law firm during in or about November 1992, **Jack Rashid** and **Charles Rashid**, while accompanied by **Jack Chilingirian** as their attorney, falsely represented to individuals who had provided the **Rashids** with funds that Siemens had to deny the existence of a contract it had with the **Rashids** so as not to breach a confidentiality clause in the contract.

c. During in or about Summer 1993, **Jack Rashid** falsely represented to Dr. Gary Rudder that he had negotiated a multi-million dollar deal with Masco and BMW.

d. During in or about February 1994, **Jack Rashid** falsely represented to Joseph Hayden that he had a contract between **Jack Rashid**, Masco and BMW, wherein **Rashid** was to receive $250,000,000 up front; **Jack Rashid** also showed Hayden a false escrow document from NBD which indicated that the $250,000,000 was being held in an escrow account and was to be transferred over to **Rashid** when the contract was finalized.

e. During on or about August 29, 1994, after the Rashids had been ordered to surrender their business, VRSS, to the bankruptcy trustee, **Jack Rashid** and **Charles Rashid** went to the offices of VRSS and removed various items from the premises and instructed the VRSS secretary to ignore the fact that they were in the offices.

f. During in or about September 1994, **Charles Rashid** invited Joseph Hayden to meet with BMW executives; it was later represented that this meeting was canceled due to BMW's chief negotiator being involved in an automobile accident.

g. During in or about February 1995, **Jack Chilingirian** falsely represented to Joseph Hayden that he, too, felt like a victim in that he had not been paid by the **Rashids** since 1992.

h. During in or about February 1995, **Jack Rashid**, during the bankruptcy of VRSS, attempted to prevent Joseph Hayden and Gary Rudder from advising the bankruptcy court that he had represented to them that the **Rashids** and their companies had negotiated a contract with Masco/BMW worth millions of dollars.

i. During on or about July 28, 1995, **Jack Chilingirian** sent Joseph Hayden an affidavit, to be signed by Hayden if he wanted money back from **Jack Rashid**, that **Jack Chilingirian** knew to be false.

j. During in or about June through September 1995, in Canada, **Jack Rashid** and **Charles Rashid** gave presentations to various individuals, all clients of Paul Tindall, soliciting them to invest in the radar technology for which **Jack Rashid** falsely represented they had a contract with a major company and that $250,000,000 was

placed in an escrow account which was available to insure their investments.

k. During in or about September 1995, **Jack Rashid** and **Charles Rashid** showed Paul Tindall and Anne Louise Tindall a fraudulent letter from John Kern of Northwest Airlines stating that Northwest Airlines was prepared to enter into an exclusive marketing agreement with **Rashid** for the radar technology ART had developed for airplanes.

l. During in or about October/November 1995, **Jack Chilingirian** requested that, as part of any bankruptcy settlement, the bankruptcy trustee and his attorney agree not to pursue their concerns regarding the **Rashids** with any federal authorities.

m. On or about November 13, 1995, **Jack Chilingirian**, in an attempt to prevent the bankruptcy trustee from inquiring further about any Masco/BMW contracts and from providing information to federal authorities about the **Rashids**, wired $232,000.00 to the bankruptcy trustee as a settlement payment; **Jack Chilingirian** falsely represented to the bankruptcy trustee's attorney that the money for the settlement was coming from a lender who was interested in having the bankruptcy matter conclude in an expeditious manner.

n. During in or about Fall 1995 through early 1996, **Jack Chilingirian** offered, through an attorney representing various individuals who had provided money to the Rashids, to provide more money in the form of a settlement if the individuals would sign affidavits reflecting they had not been defrauded by **Jack Rashid**.

o. During in or about May through August 1996, **Jack Rashid** solicited Jim Kraft, Boyd Kraft and others, to invest in radar technology that he falsely represented his company had developed for Northwest and by falsely representing that their investment would be secured by $250,000,000 in an NBD escrow account due to a completed deal between **Rashid** and Masco/BMW.

p. During in or about July 1996, **Jack Chilingirian** requested that John Schoendorff, as a precondition to receiving money back from the **Rashids**, sign a false affidavit indicating that he had not been defrauded by **Jack Rashid**.

q. During in or about April 1997, **Jack Rashid** requested that Gregory Songer, as a precondition to receiving money back from the Rashids, sign an affidavit indicating that he had not been defrauded by **Jack Rashid**.

r. The acts taken by the defendants in committing the wire and mail fraud offenses alleged in Counts 2 through 29 were also overt acts in furtherance of this unlawful conspiracy.

All in violation of Section 371 of Title 18 of the United States Code.

COUNTS TWO THROUGH FOURTEEN (18 U.S.C. §§ 1343, 2 – WIRE FRAUD, AIDING & ABETTING)

D-1 JACK RASHID
D-2 CHARLES RASHID
D-3 JACK CHILINGIRIAN

1. The General Allegations are realleged and incorporated by reference into these counts;

2. Paragraphs Two through Eleven of Count One are realleged and incorporated by reference into these counts;

3. On or about the dates indicated below, in the Eastern District of Michigan, Southern Division, and elsewhere, the defendants, **Jack Rashid**, **Jack Chilingirian** and **Charles Rashid**, aiding and abetting one another, having devised the above-described scheme to defraud and for obtaining money by false and fraudulent pretenses, representations and promises, and for the purpose of executing such scheme, did transmit and cause to be transmitted by means of wire in interstate and foreign commerce, the signals and sounds described below:

COUNT:	DATE:	TRANSMISSION:
2	9/17/93	Wire transfer of funds from Charles Rudder, California to Michigan
3	11/93	Telephone call, Michigan/California, with Charles Rudder and Gary Rudder
4	12/14/93	Wire transfer of funds from Charles Rudder, California to Michigan
5	1/94	Telephone call, Michigan/California, with Charles Rudder
6	10/94	Telephone call Michigan/Canada, with Tindall
7	11/94	Telephone call, Michigan/Canada, with Tindall
8	4/95	Facsimile of Northwest Airlines "letter" from Michigan to Canada
9	10/95	Telephone call, Michigan/Canada, with Tindall

10	10/95	Telephone call, Michigan/Canada, with Breda O'Donoghue
11	10/18/95	Wire transfer of funds from Jack Chilingirian Client Trust Account, Comerica Bank, Michigan, to Illinois account
12	10/18/95	Wire transfer of funds from Jack Chilingirian Client Trust Account, Comerica Bank, Michigan, to California account
13	5/22/96	Wire transfer of funds from Connecticut to Michigan, account of Boyd Kraft
14	6/7/96	Wire transfer of funds from Illinois to Michigan, account of Lawrence Haras

All in violation of Sections 1343 and 2 of Title 18 of the United States Code.

COUNTS FIFTEEN THROUGH TWENTY NINE
(18 U.S.C. §§ 1341, 2 – MAIL FRAUD, AIDING & ABETTING)

D-1 JACK RASHID
D-2 CHARLES RASHID
D-3 JACK CHILINGIRIAN

1. The General Allegations are realleged and incorporated by reference in these counts;

2. Paragraphs Two through Eleven of Count One are realleged and incorporated by reference in these counts;

3. On or about the dates indicated below, in the Eastern District of Michigan, Southern Division, and

elsewhere, the defendants, **Jack Rashid**, **Jack Chilingirian** and **Charles Rashid**, aiding and abetting one another, having devised the above-described scheme to defraud and for obtaining money by false and fraudulent pretenses, representations and promises, and for the purpose of executing such scheme, caused to be delivered by United States Postal Service and other interstate and foreign courier services as indicated below, according to the directions thereon, the matters and things described below:

COUNT:	DATE:	CARRIER:	MATTERS/THINGS:
15	6/16/93	U.S. Postal Service	Letter from Jack Rashid to Dr. and Mrs. Gary Rudder
16	7/93	U.S. Postal Service	Investment check from Gary Rudder
17	2/24/94	U.S. Postal Service	Letter sent by Joseph Hayden to Jack Rashid requesting meeting to see Masco/BMW contract and NBD escrow letter
18	3/25/94	U.S. Postal Service	Letter, Joseph Hayden/ Jack Rashid, summarizing investors to date and containing check
19	4/94	U.S. Postal Service	Investment check from Charles Rudder
20	9/94	U.S. Postal Service	Investment check from Charles Rudder
21	7/6/95	Federal Express	Investment checks from Canada through Tindall

22	7/17/95	Federal Express	Investment checks from Canada through Tindall
23	7/21/95	Federal Express	Investment checks from Canada through Tindall
24	7/21/95	U.S. Postal Service	Letter, Jack Chilingirian to Vince Halek and Joseph Hayden, outlining proposed settlement
25	8/3/95	Federal Express	Investment checks from Canada through Tindall
26	8/28/95	Federal Express	Investment checks from Canada through Tindall
27	4/25/96	U.S. Postal Service	Letter sent by Jack Chilingirian to attorney Stuart Goldstein
28	7/10/96	U.S. Postal Service	Investment check from Philip and Janice Bobek
29	7/11/96	U.S. Postal Service	letter sent by Jack Chilingirian to John Schoendorff outlining proposed settlement

All in violation of Sections 1341 and 2 of Title 18 of the United States Code.

COUNT THIRTY (18 U.S.C. 2314, 2 – INTERSTATE TRANSPORTATION OF FUNDS TAKEN BY FRAUD, AIDING AND ABETTING)

D-1 JACK RASHID
D-3 JACK CHILINGIRIAN

During in or about December 1994, through November 1995, in the Eastern District of Michigan, Southern

Division, and elsewhere, the defendants, **Jack Rashid** and **Jack Chilingirian**, aiding and abetting one another, did knowingly transport and cause to be transported and transmitted in foreign commerce, that is, between Michigan and Canada, funds and monies in the amount of $5,000.00 or more, knowing the same to have been stolen, converted and taken by fraud; all in violation of Sections 2314 and 2 of Title 18 of the United States Code.

COUNT THIRTY ONE
(18 U.S.C. § 1512(b)(1) –
TAMPERING WITH A WITNESS)

D-3 JACK CHILINGIRIAN

That during in or about July 1996, in the Eastern District of Michigan, Southern Division, the defendant, **Jack Chilingirian**, did knowingly and corruptly persuade, and attempt to corruptly persuade, John Schoendorff, with the intent to influence and prevent the testimony of John Schoendorff in an official proceeding, to wit, an investigation before an Eastern District of Michigan Federal Grand Jury and any criminal charges filed stemming from that investigation in a Court of the United States, by persuading John Schoendorff, if he wanted to get back money that he and his family invested with **Jack Rashid**, to sign a false affidavit indicating, among other things, that **Jack Rashid** did not defraud him; all in violation of Section 1512(b)(1) of Title 18 of the United States Code.

COUNT THIRTY TWO (18 U.S.C. § 1512(b)(1) – TAMPERING WITH A WITNESS)

D-1 JACK RASHID

That on or about April 1, 1997, in the Eastern District of Michigan, Southern Division, the defendant, **Jack Rashid**, did knowingly and corruptly persuade, and attempt to corruptly persuade, Gregory Songer, with the intent to influence and prevent the testimony of Gregory Songer in an official proceeding, to wit, an investigation before an Eastern District of Michigan Federal Grand Jury and any criminal charges filed stemming from that investigation in a Court of the United States, by requiring Gregory Songer, if he wanted to get back money that he invested with **Jack Rashid**, to sign a false affidavit indicating, among other things, that **Jack Rashid** did not defraud him; all in violation of Section 1512(b)(1) of Title 18 of the United States Code.

COUNT THIRTY THREE (18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i), and 1956(h) – CONSPIRACY TO LAUNDER MONETARY INSTRUMENTS)

D-1 JACK RASHID
D-3 JACK CHILINGIRIAN

That from in or about December of 1994 through in or about October of 1996, in the Eastern District of Michigan, Southern Division, and elsewhere, defendant **Jack Rashid** and defendant **Jack Chilingirian**, knowing that the property involved represented the proceeds of some form of unlawful activity, as defined in Title 18, United States Code, section 1956(c)(1), did knowingly, intentionally and unlawfully combine, conspire, confederate and agree with other persons whose names are known and unknown to

the Grand Jury, to conduct and cause to be conducted financial transactions affecting interstate and foreign commerce which involved the proceeds of specified unlawful activity, that is, mail and wire fraud, felonies under title 18, United States Code, Sections 1341 and 1343, with the intent to promote the carrying on of specified unlawful activity, and knowing that the transactions were designed in whole or in part to conceal and disguise the nature, location, source, ownership and control of the proceeds of such unlawful activity; all in violation of title 18, United States Code, Sections 1956(a)(1)(A)(i), 1956(a)(1)(B)(i) and 1956(h).

It was part of the money laundering conspiracy that **Jack Rashid** and **Jack Chilingirian** would take proceeds obtained through mail and wire fraud and would deposit such proceeds into client trust accounts maintained by attorney **Jack Chilingirian**, for the purpose of concealing the ownership, control and location of such proceeds and for the purpose of disguising the nature of such proceeds.

It was further part of this money laundering conspiracy that **Jack Rashid** and **Jack Chilingirian** would take proceeds obtained from victims of their mail and wire fraud scheme and transfer those proceeds to other victims of their mail and wire fraud scheme, in an effort to lull the recipients and to keep them from pursuing legal or criminal actions against **Jack Rashid** and **Jack Chilingirian** and other persons, for the purpose of promoting the underlying mail and wire fraud scheme.

All in violation of Title 18, United States Code, Section 1956(h).

COUNT THIRTY FOUR
(18 U.S.C. § 1957 – LAUNDERING
OF MONETARY INSTRUMENTS)

D-1 JACK RASHID

That in or about July of 1996, in the Eastern District of Michigan, Southern Division, defendant **Jack Rashid**, did knowingly engage and attempt to engage in a monetary transaction affecting interstate and foreign commerce in criminally derived property of a value greater than $10,000.00, that is, the proceeds of mail and wire fraud, felonies under Title 18, United States Code, Sections 1341 and 1343, such transaction involving the purchase of a 1996 SeaRay Motor Boat, Model 330DA from a business involved in boat sales; all in violation of Title 18, United States Code, Section 1957.

COUNT THIRTY FIVE
(18 U.S.C. § 1957 – LAUNDERING OF
MONETARY INSTRUMENTS)

D-1 JACK RASHID

That in or about July of 1995, in the Eastern District of Michigan, Southern Division, defendant **Jack Rashid**, did knowingly engage and attempt to engage in a monetary transaction affecting interstate and foreign commerce in criminally derived property of a value greater than $10,000.00, that is, the proceeds of mail and wire fraud, felonies under Title 18, United States Code, Sections 1341 and 1343, such transaction involving the lease of a 1995 BMW 540i automobile, from a business engaged in vehicle sales; all in violation of Title 18, United States Code, Section 1957.

COUNT THIRTY SIX
(18 U.S.C. § 1957 – LAUNDERING OF MONETARY INSTRUMENTS)

D-1 JACK RASHID

That in or about June of 1995, in the Eastern District of Michigan, Southern Division, defendant **Jack Rashid**, did knowingly engage and attempt to engage in a monetary transaction affecting interstate and foreign commerce in criminally derived property of a value greater than $10,000.00, that is, the proceeds of mail and wire fraud, felonies under Title 18, United States Code, Sections 1341 and 1343, such transaction involving the acquisition of an interest in certain real property located at 7484 Blue Water Street, Lexington, Michigan with a business involved in real estate closings and settlements; all in violation of Title 18, United States Code, Section 1957.

FORFEITURE ALLEGATION

D-1 JACK RASHID
D-3 JACK CHILINGIRIAN

The allegations of Counts Thirty Three, Thirty Four, Thirty Five and Thirty Six are realleged and incorporated by reference herein for the purpose of seeking forfeitures pursuant to the provisions of Title 18, United States Code, Section 982.

As a result of the foregoing offenses in violation of Title 18, United States Code, Sections 1956 and 1957, defendants **Jack Rashid** and **Jack Chilingirian** shall forfeit to the United States any property, real or personal, involved in such offenses, or any property traceable to such property.

Property subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 982 includes, but is not limited to, the following:

(a) One 1996 SeaRay Motor Boat, Model 330DA, Serial Number SERP3158A6760678, with all appurtenances.

(b) One 1995 BMW 540i, Vehicle Identification Number (VIN) WBAHE6320SGF33190.

(c) One 1996 Lincoln Town Car, VIN 1LNLM82W 3TY714269;

(d) One 1995 Volkswagen Cabriolet, VIN WVWBC 81E4SK009753;

(e) One 1970 Plymouth Roadrunner, VIN RM23N0A 242973;

(f) One 1995 Jeep CJ, VIN 1J4FY29S0SP292773;

(g) One 1969 Ford Mustang, VIN 9T02R162573;

(h) The real property located at 7484 Blue Water Street, Lexington, Michigan, being more fully described as:

Lots 296 and 297, BLUE WATER BEACH SUBDIVISION, according to the Plat thereof as recorded in Liber 3 of Plats, Pages 48 to 50, Sanilac County Records.

Tax I.D. No. 76-261-070-000-296-20 (Lot 296)
Tax I.D. No. 76-261-070-000-291-00 (Lot 297); and

(i) An amount of not less than $2,589,699.25 in United States Currency, or such amount as is proved at trial in this matter, in that such sum in aggregate was involved in the conspiracy to launder monetary instruments charged in Count

Thirty Three of this Indictment, or is traceable thereto.

If any of the property described above as being subject to forfeiture, as a result of the act or omission of a defendant:

(a) cannot be located upon the exercise of due diligence;

(b) has been transferred or sold to, or deposited with, a third party;

(c) has been placed beyond the jurisdiction of the Court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot subdivide without difficulty; it is the intent of the United States, pursuant to 21 U.S.C. § 853(p), as incorporated by 18 U.S.C. § 982(b), to seek to forfeit any other property of that defendant up to the value of the property listed above.

All in violation of Title 18, United States Code, Section 982.

THIS IS A TRUE BILL.

/s/ _____
FOREPERSON

SAUL A. GREEN
United States Attorney

/s/
BLONDELL L. MOREY
Assistant U.S. Attorney
Chief, Economic Crime Unit

/s/ Patrick E. Corbett
PATRICK E. CORBETT
Assistant U.S. Attorney

/s/ Terrence G. Berg
TERRENCE G. BERG
Assistant U.S. Attorney

Dated: 11-10-98

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

D-3 JACK C. CHILINGIRIAN,

Defendant. /

Criminal No. 96-CR-80670-3

Hon. John Corbett O'Meara

GENERAL FINDING PURSUANT TO RULE 23 WITH REGARD TO THE ALLEGATIONS INVOLVING THE DEFENDANT JACK C. CHILINGIRIAN IN THE THIRD SUPERCEDING INDICTMENT

(Filed Apr. 29, 1999)

Trial of this matter concluded April 19, 1999 and there being no request for special findings of facts, the court makes the following general finding pursuant to Rule 23 of the Federal Rules of Criminal Procedure:

COUNT ONE
(18 U.S.C. § 371 – CONSPIRACY)

The court finds the defendant Jack Chilingirian NOT GUILTY.

COUNTS TWO THROUGH FOURTEEN
(18 U.S.C. §§1343, 2 – WIRE FRAUD, AIDING & ABETTING)

The court finds the defendant Jack Chilingirian NOT GUILTY of each and every count.

COUNTS FIFTEEN THROUGH TWENTY-NINE
(18 U.S.C. §§ 1341, 2 – MAIL FRAUD, AIDING & ABETTING)

The court finds the defendant Jack Chilingirian NOT GUILTY of each and every count.

COUNT THIRTY
(18 U.S.C. § 2314, 2 – INTERSTATE TRANSPORTATION FUNDS TAKEN BY FRAUD, AIDING AND ABETTING)

The court finds the defendant Jack Chilingirian NOT GUILTY.

COUNT THIRTY-ONE
(18 U.S.C. § 1512(b)(1) – TAMPERING WITH A WITNESS)

The court finds the defendant Jack Chilingirian NOT GUILTY.

COUNT THIRTY-THREE
(18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i), and 1956(h) – CONSPIRACY TO LAUNDER MONETARY INSTRUMENTS)

The court finds the defendant Jack Chilingirian GUILTY.

The court orders the recording and filing of this general finding.

Sentencing will occur before this court at 10:00 a.m. on August 16, 1999.

So Ordered.

/s/ John Corbett O'Meara
John Corbett O'Meara
United States District Judge

Date: _____

FILED
SEP 17 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1684

In the Supreme Court of the United States

JACK CHILINGIRIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
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QUESTIONS PRESENTED

1. Whether petitioner's conviction, after a bench trial, for conspiring to launder the proceeds of a mail and wire fraud scheme must be reversed on the ground of inconsistent verdicts because he was acquitted at the same trial of the predicate mail and wire fraud offenses.

2. Whether, in convicting petitioner on the money laundering conspiracy count, the district court constructively amended the indictment.

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In the Supreme Court of the United States

No. 06-1684

JACK CHILINGIRIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The initial opinion of the court of appeals affirming the convictions and remanding for resentencing (Pet. App. 5a-22a) is reported at 280 F.3d 704. The second opinion of the court of appeals reversing the sentencing order and remanding for resentencing (Pet. App. 23a-44a) is not published in the *Federal Reporter* but is reprinted in 95 Fed. Appx. 782. The court of appeals' order affirming the judgment (Pet. App. 1a-4a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2007. On March 2, 2007, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including June 22, 2007, and the

petition was filed on June 18, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiring to launder money in violation of 18 U.S.C. 1956(h). He was sentenced under the fraud guidelines to 37 months of imprisonment, two years of supervised release, and restitution in the amount of $335,167.50. Pet. App. 1a; 6a. The court of appeals affirmed his conviction, but remanded for resentencing under the money laundering guidelines. *Id.* at 5a-22a. On remand, petitioner was resentenced to 87 months of imprisonment. The court of appeals again reversed the sentencing order and remanded for a statement of reasons in computing the offense level. *Id.* at 23a-44a. Petitioner filed a petition for a writ of certiorari. Pet. 9. While the petition for a writ of certiorari was pending, the district court, on second remand, reimposed the 87-month prison term. This Court then granted the petition for a writ of certiorari, vacated the Sixth Circuit's decision, and remanded to the court of appeals for reconsideration in light of *United States* v. *Booker*, 543 U.S. 220 (2005). See 543 U.S. 1098 (2005). After a third remand to the district court for resentencing, at which the court imposed the 87-month prison term once again, the court of appeals affirmed. Pet. App. 1a-4a.

1. From 1988 through 1997, petitioner served as the attorney for Jack and Charles Rashid (collectively, the Rashids) and the Rashid family's company, Vehicle Radar Systems, Inc. (VRSS). Petitioner was also a 15% shareholder in VRSS. The evidence at trial established

that, beginning in 1988, the Rashids induced individuals to invest heavily in VRSS by falsely representing that the company had multi-million dollar contracts for the sale of its automobile radar braking systems and related technology. Pet. App. 6a-7a. "Investors" were shown forged letters and agreements and alleged escrow accounts containing up to $250 million. Gov't C.A. Br. 5-6. In 1992, VRSS filed a Chapter 11 bankruptcy reorganization petition, which was converted into a Chapter 7 liquidation proceeding in 1994. Pet. App. 7a; Gov't C.A. Br. 11.

In 1995, petitioner and the Rashids attempted to settle all of the bankruptcy claims against VRSS and the Rashids with money the Rashids had raised from a new group of Canadian investors. Pet. App. 7a. A new company, Advanced Radar Technologies (ART), was incorporated in Canada to receive these funds. Neither the Rashids nor petitioner informed the Canadian investors about VRSS's bankruptcy or their plan to use the investors' money to pay VRSS's creditors. *Id.* at 8a. The Canadians invested $2.48 million in ART. Petitioner endorsed $2.267 million of those checks into his client trust account, and then wrote checks worth $275,000 to himself, gave $1.473 million to Jack Rashid, and disbursed $480,000 to settle various investors' claims against the Rashids. *Ibid.*

In April 1996, Jack Rashid solicited an investment in ART from his friend James Kraft. Kraft invested money from his retirement account and brought in contributions from over 30 other investors. Petitioner deposited these funds in a new client trust account and withdrew money from this account for Jack Rashid and himself. Pet. App. 8a-9a.

2. On April 23, 1997, petitioner was indicted for conspiracy to commit mail and wire fraud (18 U.S.C. 371), 13 counts of wire fraud (18 U.S.C. 1343), 15 counts of mail fraud (18 U.S.C. 1341), aiding and abetting the interstate transportation of funds taken by fraud (18 U.S.C. 2314), witness tampering (18 U.S.C. 1512(b)(1)), and conspiracy to launder money instruments (18 U.S.C. 1956(a)(1)(A)(i), (B)(i) and (h)). The money laundering conspiracy count alleged that petitioner and Jack Rashid conspired to deposit the proceeds of mail and wire fraud into client trust accounts maintained by petitioner to disguise the nature of those proceeds, and to pay victims of the fraud in an effort to keep them from pursuing legal or criminal action against petitioner and the Rashids. Pet. App. 45a-68a.

After a bench trial, the district court convicted petitioner on the money laundering conspiracy charge but acquitted on all other counts. The district judge specifically rejected the notion that its verdict was inconsistent, explaining that petitioner's "role as lawyer and advocate" created "reasonable doubt" as to whether he possessed the scienter required by the other counts. But, as to the money laundering conspiracy count, the district judge found no reasonable doubt "that there was an intent to conceal or disguise" the proceeds of the fraudulent scheme. Gov't C.A. Br. 35-36.[1]

3. Notwithstanding the district judge's explanation at sentencing, petitioner argued in his first appeal that his money laundering conspiracy conviction should be reversed because it was inconsistent with his acquittals

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[1] Charles Rashid, the only other co-defendant to plead not guilty and go to trial, was convicted of the mail fraud conspiracy and on numerous substantive mail and wire fraud counts. See *United States* v. *Rashid*, 274 F.3d 407, 412 (6th Cir. 2001).

on the mail and wire fraud counts. The court of appeals concluded that inconsistent verdicts rendered by a judge, like those rendered by a jury, provide no basis for reversal. Pet. App. 12a-15a. The court relied chiefly on this Court's reasoning in *Harris* v. *Rivera*, 454 U.S. 339, 345-348 (1981) (per curiam), which held on collateral review that inconsistent verdicts at a bench trial do not violate the Constitution. Pet. App. 13a-14a. An "apparent inconsistency in a trial judge's verdict," this Court said, does not "give[] rise to an inference of irregularity * * * that is sufficiently strong to overcome the well-established presumption that the judge adhered to basic rules of procedure." *Harris*, 454 U.S. at 347. Such an inconsistency might be due to "doubt * * * that [the judge] might or might not [have been] able to articulate in a convincing manner," to an error of law in the defendant's favor, or to lenity. *Ibid.*

Petitioner also argued on appeal that the district court improperly allowed the government to amend the money laundering conspiracy count by finding him guilty on that count without convicting him of the mail and wire fraud violations alleged as predicate acts. The court of appeals rejected that claim, Pet. App. 15a-17a, explaining that a defendant can be guilty of money laundering even if he did not commit the predicate act personally—indeed, even if he did not know what form the unlawful activity took—so long as he knew that his transactions involved the proceeds of an unlawful activity. *Id.* at 17a. Because petitioner's participation in the mail and wire fraud offenses was "never essential" to proving that he conspired to launder money, the court concluded that his "conviction for the latter at the same time as [his] acquittal on the former did not result in an amendment to the indictment." *Ibid.*

ARGUMENT

Petitioner renews his contentions (Pet. 12-30) that the district court rendered an inconsistent verdict and erroneously allowed the government to amend the indictment. The court of appeals correctly rejected these arguments, and further review is not warranted.

1. Petitioner first contends (Pet. 13-20) that his conviction for conspiring to launder the proceeds of the fraudulent scheme was inconsistent with his acquittals on the mail and wire fraud counts, and that the asserted inconsistent verdict violated his Fifth and Sixth Amendment rights. Although the rule permitting inconsistent jury verdicts is long established, see *United States* v. *Powell*, 469 U.S. 57, 58 (1984), petitioner says that bench trials pose a different problem.

Contrary to petitioner's assertion, there was no inconsistency in the district court's verdict. The money laundering statute does not require that a defendant actually participate in the activity that generates the unlawful proceeds to be laundered. Indeed, he need not even know the nature of the activity that generated the proceeds. The statute requires only that he conduct a financial transaction with the specified impermissible intent (*e.g.*, to promote certain unlawful activity or to conceal the nature of the proceeds) "knowing that the property involved in [the] financial transaction represents the proceeds of some form of unlawful activity." 18 U.S.C. 1956(a)(1). Consequently, the district court could reasonably have concluded that the mail and wire fraud offenses were committed by the Rashids and not petitioner, but that petitioner laundered the proceeds knowing that they stemmed from the Rashids' unlawful activities. As the court of appeals recognized, "proving that [petitioner] committed mail and wire fraud was

never essential to proving that he conspired to launder money." Pet. App. 17a. For that reason, this case is not an appropriate vehicle for this Court to consider whether inconsistent bench verdicts are permissible.

Nor in any event is that question worthy of this Court's attention. *Harris* v. *Rivera*, 454 U.S. 339 (1981) (per curiam), held that inconsistent verdicts rendered at a bench trial do not violate the Constitution so long as the defendant received a fair trial and the record contains sufficient evidence of the defendant's guilt on the count for which he was convicted. *Id.* at 348. Although the Court in *Harris* did not decide whether on direct appeal it would exercise its supervisory power to reverse an inconsistent nonjury verdict, *id.* at 342 n.7, petitioner relies on the Constitution and does not ask this Court to invoke its supervisory power. Moreover, the reasoning underlying the constitutional rule in *Harris*—that one should "presum[e] that the judge adhered to basic rules of procedure," particularly where there exist "[o]ther explanations for an apparent inconsistency," *id.* at 347—applies with equal force to the Court's supervisory power.

The federal cases relied upon by petitioner (Pet. 14-16), *United States* v. *Maybury*, 274 F.2d 899 (2d Cir. 1960), and *United States* v. *Duz-Mor Diagnostic Laboratory, Inc.*, 650 F.2d 223 (9th Cir. 1981), both predate *Harris* and so did not benefit from the Court's guidance. The Ninth Circuit has subsequently questioned the "viability" of *Duz-Mor* in light of *Harris*. *United States* v. *Upshaw*, 685 F.2d 1202, 1204 n* (1982). And the only federal court of appeals to decide the issue since *Harris* has upheld inconsistent verdicts. *United States* v. *Wright*, 63 F.3d 1067, 1073-1074 (11th Cir. 1995).

As for the state cases cited by petitioner (Pet. 16-17), each relies on state common law to conclude that inconsistent nonjury verdicts require reversal.[2] See *Akers* v. *Commonwealth*, 525 S.E.2d 13, 16-19 (Va. Ct. App. 2000); *State* v. *Meyer*, 832 P.2d 357, 361-365 (Kan. Ct. App. 1992); *Shell* v. *State*, 512 A.2d 358, 362-364 (Md. 1986); *People* v. *Williams*, 297 N.W.2d 702, 703 (Mich. Ct. App. 1980). Because this Court does not review routine decisions by state courts interpreting state law, see Robert L. Stern et al., *Supreme Court Practice* § 3.1(d), at 130-131 (8th ed. 2002), and *Dickerson* v. *United States*, 530 U.S. 428, 438 (2000), the decisions do not establish any conflict the Court can resolve.

2. Petitioner also argues that the district court constructively amended the indictment in finding him guilty on the money laundering conspiracy count. Pet. 20-30. A "[c]onstructive amendment occurs when 'the terms of the indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of [an uncharged offense].'" *United States* v. *Wallace*, 59 F.3d 333, 337 (2d Cir. 1995) (quoting *United States* v. *Mollica*, 849 F.2d 723, 729 (2d Cir. 1988)).

Here, petitioner says, because he was acquitted on the mail and wire fraud counts, his money laundering conspiracy conviction must have rested on predicate acts other than the mail and wire fraud offenses alleged in the indictment.[3]

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[2] *State* v. *Knight*, 835 A.2d 47 (Conn. 2003), also cited by petitioner, did not reach the question. See *id.* at 56.

[3] Petitioner advanced this same claim in his previous petition for a writ of certiorari, and this Court, rather than granting plenary review on that issue, simply vacated and remanded for further consideration

This second argument suffers from the same infirmity as the first: the money laundering charge did not depend upon petitioner's participation in the mail and wire fraud offenses. It was enough for petitioner to have laundered money knowing it to be the proceeds of the fraud alleged in the indictment and carried out by the Rashids. See Pet. App. 62a-63a; 18 U.S.C. 1956(a)(1). In the absence of evidence at trial of another possible source for the money, there is no reason to think that the district court relied on predicate acts other than the mail and wire fraud offenses charged in the indictment.

Neither of the cases on which petitioner relies (Pet. 27-30) advances his cause. In *United States* v. *Rahseparian*, 231 F.3d 1267 (10th Cir. 2000), cert. denied, 532 U.S. 974 (2001), the defendant had been indicted for mail fraud and for laundering the proceeds of that fraud; he was convicted on both counts. The court reversed the mail fraud conviction on the ground that the defendant was unaware of the fraud. *Id.* at 1262-1264. He therefore could not have knowingly laundered its proceeds, and so the court reversed the money laundering conviction as well. *Id.* at 1267.

In this case, by contrast, petitioner's acquittal on the mail and wire fraud counts did not rule out his conviction on the money laundering count. The court made no finding that petitioner lacked knowledge of the fraudulent scheme alleged in the indictment and carried out by the Rashids; rather, it found reasonable doubt concerning petitioner's intent to defraud. Gov't C.A. Br. 35-36.

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in light of *United States* v. *Booker*, 543 U.S. 220 (2005). See 543 U.S. 1098 (2005).

That finding did not preclude his conviction for knowingly laundering the proceeds of the fraud.

Nor is petitioner helped by *United States* v. *Handakas*, 286 F.3d 92 (2d Cir.), cert. denied, 537 U.S. 894 (2002). There, the defendant was convicted *inter alia* of conspiracy to commit mail fraud and conspiracy to commit money laundering. The court reversed his conviction for mail fraud on the ground that the statute was unconstitutionally vague as applied. *Id.* at 100-112. Because the mail fraud count was the only available predicate for the money laundering count, the court held that the money laundering conviction must also fall: since the mail fraud statute was unconstitutionally vague as applied, there was no mail fraud offense and therefore no illicit proceeds to launder. *Id.* at 112-113.

Here, by contrast, the district court did not find that there was no mail or wire fraud offense, but only that petitioner was not a criminally culpable participant in the fraud.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States

JACK CHILINGIRIAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF

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REPLY BRIEF

The Sixth Circuit below acknowledged a clear conflict among the courts of appeals on the question whether an inconsistent verdict issued in a nonjury criminal trial is reviewable as a check against the arbitrary exercise of power. Pet. App. 13a-15a. In its opposition, the United States does not dispute the existence of the split. It argues that the petition should nevertheless be denied for two principal reasons: first, this Court's decision in *Harris v. Rivera*, 454 U.S. 339 (1981) (per curiam), somehow undermines the importance of the conflict; and, second, the district court's verdict below in fact contains no inconsistency.

Neither of the government's arguments has force. This Court's decision in *Harris* acknowledged both Judge Friendly's decision in *United States v. Maybury*, 274 F.2d 899 (1960), and the Ninth Circuit's decision in *United States v. Duz-Mor Diagnostic Laboratory, Inc.*, 650 F.2d 223 (1981), and it expressly disclaimed any intent either to overturn those cases or to resolve the issue presented here. In the years since *Harris*, neither the Second Circuit nor the Ninth Circuit has disavowed either case, and state courts and commentators continue to treat them as binding precedent, as did the Sixth Circuit here.

Similarly unpersuasive is the government's argument that there is no inconsistency between the conviction on the money-laundering conspiracy count and the acquittal on mail and wire fraud counts. Opp. 6-7. Contrary to the government's suggestion, petitioner has never relied on his acquittal on the mail and wire fraud counts as the *only* inconsistency in the district judge's verdict. To the contrary, the verdict is inconsistent because the conviction on the money-laundering conspiracy count cannot be squared with the "general finding of not guilty on all other conspiracy

charges alleged in the indictment," Pet. i; and as to that argument, the government has nothing to say.

Moreover, the right to have the federal court of appeals determine the consistency of the district court's verdict is the very right that petitioner sought to vindicate in the court of appeals, and that petitioner seeks to vindicate here. The Sixth Circuit refused to undertake that review because of its threshold determination – in conflict with that of the Second and Ninth Circuits – that a consistency review was impermissible. To the extent the government seriously disputes the inconsistency of the verdict (as the Sixth Circuit in its opinion did not), the government can argue that to the court of appeals on remand.

ARGUMENT

I. THERE IS A DIRECT, ACKNOWLEDGED, AND CONTINUING CONFLICT AMONG THE CIRCUITS.

In the decision below, the Sixth Circuit noted the conflict between the Second Circuit's *Maybury* decision and Ninth Circuit's *Duz-Mor* decision on the one hand, and the Eighth Circuit's decision in *United States v. West*, 549 F.2d 545 (8th Cir. 1977), and the Eleventh Circuit's decision in *United States v. Wright*, 63 F.3d 1067 (11th Cir. 1995), on the other. In *Maybury* and *Duz-Mor*, the courts of appeals held that inconsistent verdicts in a nonjury criminal trial were grounds for review on appeal; in *Wright* and *West*, the courts held that "inconsistent verdicts rendered by a judge provide no greater grounds for reversal than inconsistent verdicts rendered by a jury." Pet. App. 14a-15a. The Sixth Circuit then expressly aligned itself with the Eighth and Eleventh Circuits. *Id.* at 15a.

Notably, nowhere in its opposition does the United States deny the existence of a conflict. Instead, the government

suggests that this Court's opinion in *Harris* makes the inconsistent bench trial verdict here not "worthy of this Court's attention." Opp. 7. But nothing in *Harris* counsels against review here, as *Harris* itself makes clear. In *Harris*, the Court considered only the issue of whether a challenge to a state court's inconsistent bench trial verdict could be considered on federal habeas. The Court concluded that such a challenge was not of constitutional dimension, and thus could not be considered on federal habeas review. The Court in *Harris*, however, expressly disclaimed any intent to resolve the question presented here, noting that "[t]his case does not raise any question concerning the significance that an appellate court may attach to an apparent inconsistency in a verdict that is subject to review on direct appeal." *Harris*, 454 U.S. at 343. Indeed, the Court's disclaimer can only be read as a specific intent to leave *Maybury* and *Duz-Mor* undisturbed, since it followed immediately upon the Court's own detailed discussion of those cases. *See id.* at 342 n.7.

And that is exactly how the Sixth Circuit saw the matter. Far from viewing the issue as having been decided in *Harris*, the Sixth Circuit acknowledged the lack of clarity on this issue: "[t]he question of whether an inconsistent verdict rendered by a judge is reviewable, or grounds for reversal or a new trial, has not been resolved in this circuit." Pet. App. 12a.

More to the point, neither the Second Circuit nor the Ninth Circuit has overturned these precedents in light of *Harris*. And given that the Court in *Harris* expressly exempted this issue from the scope of its opinion, there would be no basis for either court of appeals to do so.

Moreover, the clear conflict among the circuits substantially understates the degree of confusion in this area of the law. State courts continue to grapple with the reviewability of inconsistent nonjury criminal verdicts, and,

although not bound by *Maybury* or *Duz-Mor*, those courts routinely cite *Maybury* and *Duz-Mor* to justify their conclusions even in the post-*Harris* world. *See, e.g.*, *State v. Knight*, 835 A.2d 47, 55-56 (Conn. 2003); *Akers v. Commonwealth*, 525 S.E.2d 13, 17 & n.3 (Va. Ct. App. 2000); *State v. Meyer*, 832 P.2d 357, 362-63 (Kan. Ct. App. 1992); *Shell v. State*, 512 A.2d 358, 362-63 (Md. 1986); *People v. O'Malley*, 439 N.E.2d 998, 1002 (Ill. App. Ct. 1982).[1]

And that is no surprise. Judge Friendly's opinion in *Maybury* captures a powerful intuition. The Second Circuit reversed Maybury's conviction "not because of any desire for *elegantia juris* but because we can have no confidence in a judgment convicting [the defendant] of one crime when the judge, by his acquittal of another, appears to have rejected the only evidence that would support the conviction here." 274 F.2d at 905. As Judge Friendly further explained:

> There is no need to permit inconsistency in the disposition of various counts so that a judge may reach unanimity with himself; on the contrary, he should be forbidden this easy method of resolving doubts. . . . We do not believe we would enhance respect for law or the court by recognizing for the judge the same right to indulge in 'vagaries' in the

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[1] The government misses the point when it argues that these state court decisions "do not establish any conflict the Court can resolve." Opp. 8. The state court decisions establish both that *Maybury* and *Duz-Mor* remain in effect, and that – contrary to the government's contention – *Harris* does not resolve either directly or by implication the issue presented here. The split among the state courts seeking to resolve the appealability issue as a matter of state law also make clear that petitioner has at the very least a substantial argument that the Sixth Circuit's decision on the reviewability of petitioner's claim is wrong, reinforcing the need for this Court's review.

> disposition of criminal charges that, for historic reasons, has been granted the jury. . . . Since we find no experience to justify approval of inconsistent judgment when a criminal case is tried to a judge, we think logic should prevail.

Id. at 903; *see also Duz-Mor*, 650 F.2d at 226 (noting that a bench trial involves "no collective deliberation and therefore no element of compromise in the assessment of the evidence . . . [nor any] need to defer to the privacy of jury deliberations or the possibility that an acquittal is merely an exercise of the jury's power of deciding 'in the teeth of both law and facts,'" (quoting *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920) (Holmes, J.))).

Commentators have picked up on that theme. Defendants often choose a bench trial because they fear a jury would be "prone to mistake or guided by passion rather than reason in deciding the case." Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 Harv. L. Rev. 771, 802 n.159 (1998); *see also* Adam H. Kurland, *Providing a Federal Criminal Defendant with a Unilateral Right to a Bench Trial: A Renewed Call to Amend Federal Rule of Criminal Procedure 23(a)*, 26 U.C. Davis L. Rev. 309, 310-12 (1993). A defendant who chooses a bench trial surrenders his ability to appeal to the Sixth Amendment's requirement that jury verdicts be unanimous. It is exchanged for a modest guarantee: that the judge who is, after all, an expert capable of avoiding the mistakes that juries make and a professional who subordinates passion to reason, will reach "unanimity with himself." *Maybury*, 274 F.2d at 903.

Further, verdicts from a lone fact finder that are the product of mutually exclusive determinations on necessary facts appear unmistakably arbitrary. While many juries would likely be incapable of forming a single coherent

articulation of the reasoning they collectively used to reach a unanimous decision, no such constraint exists in a bench trial. Thus, the judge's inability to articulate a logically coherent view is arbitrary in a way that the jury's inability is not. *Cf., e.g., Daniels v. Williams*, 474 U.S. 327, 331 (1986) (stating that "the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, ... was intended to secure the individual from the arbitrary exercise of the powers of government") (citations omitted); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government . . . ."). Such arbitrariness breeds cynicism and disrespect for the judiciary. That the decision-maker is unelected, tenured for life, invested with absolute immunity, and positioned to repeat the offense amplify these effects in a way not possible when a randomly constituted jury returns inconsistent verdicts.[2]

II. THIS CASE SQUARELY PRESENTS THE ISSUE.

This case presents an ideal vehicle to address the reviewability of inconsistent nonjury criminal verdicts. The government argues to the contrary, suggesting that "there was no inconsistency in the district court's verdict," Opp. 6, and arguing in particular that there is no inconsistency between conviction on money laundering and acquittal on mail and wire fraud, *id.* at 6-7. But the government's argument is flawed.

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[2] The government's suggestion that petitioner "relies on the Constitution and does not ask this Court to invoke its supervisory power," Opp. 7, is incorrect. Nothing in the question presented invokes the Constitution or limits the petitioner's arguments to those of constitutional dimension. The petition seeks review of the precise question left open in *Harris*, namely whether an inconsistency in a verdict issued in a nonjury criminal trial is reviewable on direct appeal, as a matter of the Court's supervisory power or otherwise.

First, the government impermissibly narrows the scope of petitioner's challenge by focusing solely on the acquittals on the mail and wire fraud charges. In fact, petitioner was acquitted of 32 of the 33 charges against him, and petitioner contends that the money laundering conviction is inconsistent with the entire scope of acquittals, not just the mail and wire fraud charges.

Thus, for example, petitioner contends that the money laundering conviction is irreconcilable with his acquittal on Count 30, Aiding and Abetting Interstate Transportation of Funds Taken by Fraud ("Transportation of Funds"). The government concedes that the money laundering conviction required the district court to have concluded at the very least that petitioner "laundered money knowing it to be the proceeds of the fraud alleged in the indictment and carried out by the Rashids," Opp. 9, and that petitioner intended to "conceal the nature of the proceeds," *id.* at 6. But those conclusions are flatly inconsistent with the acquittal on the Transportation of Funds charge, which also requires proof that petitioner knew the money was "stolen, converted, or taken by fraud." 18 U.S.C. § 2314.[3] The district court's conclusory assertion that there was no inconsistency in the verdict because the court had reasonable doubt about petitioner's scienter on the counts other than the money laundering count, Opp. 4, cannot be sustained. In order to be

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[3] There are no non-common elements between the two counts to reconcile Chilingirian's money laundering conviction with his acquittal of Transportation of Funds. For example, no reasonable doubt could have existed that Chilingirian "transport[ed], transfer[red] or transmitt[ed]" funds within the meaning of 18 U.S.C. § 2314. That statute, under which he was charged with Transportation of Funds, specifically applies to money transported "in interstate or foreign commerce." Chilingirian was convicted of money laundering in part based on his creation of a trust account in Canada. Pet. App. 8a; Opp. 2-3. Thus, transporting was necessarily established by the conviction, and the district court never suggested otherwise.

convicted of money laundering, petitioner must at least have known that the nature of the activity was illegal, as the statute requires that he know the property involved in the transaction "represents the proceeds of some form of unlawful activity." 18 U.S.C. § 1956(a)(1); *see also id.* § 1956(c)(1).

But the government cannot explain (and does not even try to explain) how, if petitioner "laundered money knowing it to be the proceeds of the fraud alleged in the indictment and carried out by the Rashids," Opp. 9, he could possibly have *not known* that the proceeds that resulted from those actions were "stolen, converted, or taken by fraud" for the purposes of the Transportation of Funds count. The Rashids were not charged or convicted on *any* basis other than fraud, so there is no other crime or illegal activity that petitioner could have known resulted in these proceeds. In addition, this case is not one where the defendant allegedly participated in a convoluted or elaborate money laundering scheme where the origin of the proceeds and the unlawful activity was unclear. All of the allegations stated that petitioner was involved with structuring the very transactions at issue in the fraud charges. Pet. App. 8a-9a. Indeed, the government acknowledged the interdependency of the charges at trial by "suggest[ing] that if Petitioner conspired to launder money, then he also conspired to defraud." *Id.* at 13a. The only reasonable explanation is that the verdict is inconsistent.

Moreover, the government's argument on the absence of any inconsistency is misguided. The Sixth Circuit did not decide the case on the grounds that there was no inconsistency – indeed, it did not even suggest that that might be the case. Instead, it decided the case on the threshold question of whether it was even open to an appellate court to undertake such a review for inconsistency. All along, petitioner has sought to have an appellate court confront the question of whether his conviction on a single money

laundering count was inconsistent with his acquittal on the 32 other counts in the indictment, and the Sixth Circuit has refused to even consider the issue. The government should not now be able to justify that threshold denial on the basis of one conclusory – and demonstrably wrong – paragraph in its opposition. Although petitioner believes the inconsistency is stark and unavoidable, to the extent that this Court's decision does not resolve the issue, it would remain open to the government to argue to the contrary on remand once this Court resolves the threshold issue of appealability.

III. THE INCONSISTENT VERDICT ALSO CONSTITUTED AN IMPERMISSIBLE AMENDMENT OF THE INDICTMENT.

Finally, for the same reasons that the verdict of the district judge is inconsistent and should not be allowed to stand, the verdict is also at odds with the language of the indictment and is therefore impermissible. The indictment specified that Petitioner had specific knowledge and participated in the fraud and laundered money in furtherance of the fraud. *See* Pet. 20-30. The Sixth Circuit's conclusion that an amendment of the indictment did not occur conflicts with established precedent in other circuits, namely *United States v. Rahseparian*, 231 F.3d 1257 (10th Cir. 2000), and *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002), *rev'd on other grounds*, *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003). This error constitutes a separate basis for reversal that should be heard by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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